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IN THE

Supreme Court of the United States

No. 477. October Term, 1929.

BARKER PAINTING COMPANY,
Petitioner,

and

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*,
Respondents.

BRIEF OF PETITIONER.

Plaintiff Below

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

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Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *and* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.,* *Respondents.*	*On Certiorari.* *No. 477 October Term, 1929.*

BRIEF OF PETITIONER.

(Italics mine except where otherwise noted.)

I.

The Opinions Below.

This case is here on certiorari granted December 9, 1929 (p. 169) U. S. Supreme Court Advance Opinions, No. 4, p. 135, 74 L. Ed. 135, to review a decree of the Circuit Court of Appeals for the Third Circuit, filed August 12, 1929 (p. 168) affirming a decree of the District Court for the District of New Jersey, filed March 28, 1928 (p. 33), dismissing plaintiff's bill in equity. The opinion of the District Court, the court of first instance, is reported in 12 Federal 2nd, 945, and is printed p. 20 of the record. The opinion of the Circuit Court of Appeals is reported in 34 Federal 2nd p. 3, and is printed p. 165 of the record.

II.

Jurisdiction.

The jurisdiction of this court is rested on section 240 of the Judicial Code, as amended by the act of February 13,

1925, sec. 1, 43 Statutes 938, sec. 347, title 28, U. S. C. A. p. 359.

The jurisdiction of the District Court was rested upon: diversity of citizenship; that the statute of the State of New Jersey, entitled: "An act relative to persons combining and encouraging other persons to combine," P. L. 1883, p. 36, 3 C. S. of N. J. p. 3051, which reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any persons, person or corporation."

as construed by the highest court of the State, is repugnant to the 14th amendment to the constitution of the United States in that its effect is to deprive petitioner of property without due process of law and to deny it the equal protection of the law; that the defendants are engaged in a conspiracy in violation of Section 1, U. S. C. A. Title 15, p. 4, Act of July 2, 1890, c. 647 Sec. 1 26 Stat. 209 (Sherman Anti Trust Act) and p. 148, Sects. 12, 13, 14, 15, 16 and 17 U. S. C. A. Title 15, Act of Oct. 15, 1914, c. 323, 38 Stat. 730 (Clayton Act).

III.

STATEMENT OF THE CASE.

Resume of the Facts.

The bill alleged, and the proof on final hearing showed that: petitioner employed exclusively union labor, operating closed union shop; petitioner on November 8, 1924, took a contract from the general contractor for the painting work on a hospital in Somerville, Somerset County, New Jersey; the contract provided that the work should be

performed as required by the progress of the job; petitioner proceeded, employing help all local to Somerville except the foreman; it complied with all union conditions as to hours and wages, etc. for the territory in which Somerville is located; the work proceeded from December 7, 1924, to February 21, 1925, with all of the men satisfied; on February 21, 1925, George W. Hoffman, the business agent of Local No. 734, not a painter but acting also for the Building Trades Council having jurisdiction in Somerville, that council being made up of delegates from various building trades unions, instructed by Harry S. Warren the state organizer of the National union, insisted that petitioner pay the wage scale of New York, its home town, which was higher than that for Somerville, and threatened that, if it did not, the employees of petitioner would be directed not to work; petitioner refused; the men were directed to cease work and did so although satisfied with their wages, hours and working conditions; they ceased only because they feared, if they continued at work, that they would be expelled from the union and thereby deprived of earning a livelihood, the industry being, in effect, 100 per cent. unionized; the painting industry and all other branches of the building industry in New York, northern New Jersey, Connecticut and Pennsylvania are so unionized, and the agreements between the different branches of the building industry are such, as that no painting work can be performed except with union labor, for if it were so performed, all other branches of the building industry would withdraw from the building and it could never be completed; a contractor cannot be "fair" in one place and "unfair" in another and if he employs non-union labor on one job all of his jobs throughout the country whether manned exclusively with union labor or not, will be struck and all building trades will withdraw from any job upon which he is engaged anywhere in the country; the National union threatened to compel petitioner and all other painting contractors to comply with the rule by strikes and boy-

cotts; the effect of the rule and its enforcement at the time of the trial had been such as that painting contractors of New York could not take work in New Jersey; the business is highly competitive and the effect of the rule, if enforced, will be to limit all painting work to local contractors.

The foregoing is a summary of the facts.

Further Consideration of the Facts.

In his answer to the petition for certiorari and his brief counsel for respondents questioned some of these statements which makes it necessary to refer to the record.

The substance of the rule, the enforcement of which the bill seeks to prevent, is stated in the bill paragraph second 7, p. 9, admitted by the answer paragraph 5, p. 18, and in the opinion of the District Court, p. 21, as follows:

> "Where there is a difference between the wage scale of two cities all members employed upon a job in one of the two cities by an employer from the other (whether sent from the city in which the employer's place of business is situated or hired in the city where the work is done) shall receive the higher of the two wage scales."

This rule was supplemented by another which provides that upon any job performed by an outside employer at least 50 per cent. of the employees engaged on such job shall be hired from the locality in which it is being performed (Bill, par. 12, p. 12; Answer, par. 8; Rule 62, Exhibit D. 1, p. 157).

There are elaborate provisions in the constitution of the Brotherhood for clearance cards, etc., so that no member can go from one locality to the other without the consent of the Local having jurisdiction in the place in which the work is to be done and for implicit obedi-

ence of every member with every rule and for fine and expulsion for violation of a rule (Sec. 133, p. 148; Sec. 271, 274, p. 151).

In the States of New York, Pennsylvania, New Jersey and Connecticut the painting industry, and the building industry as a whole, is practically 100 per cent. unionized (Rosenthal, p. 43; Hass, p. 62; Kelley, p. 60; Joseph F. Kelley, p. 130); it is impossible to complete a building without the use of union labor (Rosenthal, p. 43; Kelley, p. 60; Hass, p. 62); there is an understanding, sometimes expressed in rules where there are district councils which take into their memberships representatives of the various unions controlling labor in different branches of the building industry, to the effect that, if any work is performed upon a building by non-union labor in one trade, the other trades will do no work upon the building (Warren, pp. 89 to 91; Rosenthal, p. 47; Hoffman, p. 74); a contractor cannot be fair in one place and unfair in another so that, if in one locality he employs non-union labor, union labor will not work for him in another nor will the union labor work upon buildings upon which he has a contract in other localities (Warren, p. 91; Rosenthal, p. 44; Hass, p. 62); *the rules of the Union have the force of law* (Landow, p. 79; Joseph F. Kelley, p. 137); it is impossible for a contractor to pay more than the local rate for union painters in the locality in which the work is being done, labor representing 65 per cent. of the cost of contracting painters (Mackay, p. 98; Rosenthal, p. 44; Kelley, pp. 59, 61; Hass, p. 62), and still continue in business.

There is a contention by defendants that, painting contractors in bidding figure on the wage scale of their "home cities" if that scale happens to be the higher, but there is no evidence of probative value to support the contention.

The evidence relied upon by defendants is that of Joseph F. Kelley (Second General Vice-President of the union) (pp. 107, 110), but see his cross examination (pp. 119, 121, 123, 124); Warren (p. 86, but see his cross examination (p. 92); Landow, p. 77); all of whom are officials of the Union and who, the testimony demonstrates, know nothing about it, whereas the testimony of Rosenthal (p. 42); Hass (p. 62); John S. Kelley (p. 60) and Mackay (p. 98), all contracting painters, the three latter having no connection with plaintiff, is to the contrary.

Plaintiff, Barker, had a contract for the painting and decorating work on the Somerset Hospital, Somerville, New Jersey, dated November 8, 1924 (Exhibit P. 1, p. 143); it commenced work late in January, 1925, starting with a couple of men and running up to about six (p. 44); the union rate at the "home city" of plaintiff was $10.50 for an eight-hour day (p. 44); the union rate in Somerville, New Jersey, was $8.00 per day; plaintiff operated a closed union shop, as it *must* to do any business and it employed exclusively union men (p. 44); the work progressed for several weeks, when it was stopped because of the refusal of plaintiff to pay the New York wage to local men (p. 44); the work was about thirty per cent. complete and its condition was such as that it was necessary that it should be forthwith prosecuted so as not to interfere with the completion of the building; the work was figured by plaintiff upon the local rate (p. 48);

Arthur P. Demaray (p. 49), Thomas Winsor (p. 52), and Joseph Housh (p. 56), employees of plaintiff who ceased work, were called by plaintiff and the effect of their testimony as to why they quit is well expressed by Demaray, who says that George W. Hoffman, who is the Business Agent, representing the Somerville Building Trades Council, which is composed of carpenters, plumbers, electricians, painters and laborers (p. 66), came upon

the job and said: "You fellows can't continue here; you will have to let today be your last," and by Housh, when he said (p. 56) that Hoffman came on the job and said to the men "I will have to pull the job, you fellows are entitled to ten dollars and fifty cents and you can't come back until it is settled and they pay ten dollars and fifty cents a day."

These employees were perfectly satisfied with the wage which they were receiving and, after the temporary injunction had been granted, Winsor and Housh went back to work.

The control of the union representatives over the men is well indicated by the statement of Winsor (p. 54) that he went back because he couldn't "find anybody to tell me not to go back to work." Demaray, who did not go back to work for plaintiff after the injunction, says that he was content with his wages, hours and working conditions and that the only reason why he quit was that *Hoffman told him to.*

Hoffman went on the job at the time he stopped it after a conferene with Warren, General Organizer of the Brotherhood, with the purpose and intent of preventing the work being prosecuted unless the rules were complied with (Hoffman, pp. 66, 67).

The Claimed Justification for the Rule.

The alleged justification for the rule, from an economic standpoint, is found in the testimony of Warren (p. 87); Landow (p. 76); Joseph F. Kelly (p. 112). Were the reasons stated founded on fact, they would not be sufficient *to justify a combination* to enforce such a rule so interfering with the natural rights of the employer, the builder and the public desiring to erect houses, by coersion.

Substantially the reasons given by the unions were that employers were in the habit of employing partly foreign and partly local employees and paying the local rate to the local employees and the foreign rate to the foreign employees, which created friction and that the foreign employer always figured upon the rate prevailing at the place of his main office.

It is hard to say, from the testimony, what the claimed justification for the action of the Brotherhood is. While it is *suggested* that there is a justification because of friction which had occurred prior to the enforcement rule there is an indefiniteness in the testimony offered which indicates quite clearly that it was *not* the *real* reason.

It would seem from the testimony of Joseph F. Kelly, (Second General Vice-President of the union) that the *real* reason for the adoption of the rule was that certain of the Brotherhood members *thought* that employers, who came from a foreign district, figured their jobs upon the foreign rate (pp. 112-117). The witness testified—

> "A Yes, sir; some of the things that I advanced were advanced on the floor of the assembly. One, in *particular* was the fact that in a number of instances the higher rate was estimated on and for that reason the delegates that were advocating the higher rate advanced that as their reason for this change in our constitution."

Again, when asked to summarize the reasons for the rule:

> "I thought I explained those early in the affair. Of course, I said that the reasons advanced were on account of the members knowing and believing that all this work was estimated at the higher rate, and again for to keep down the friction that would exist where there were two scales of wages."

There is no probative evidence of any friction sufficient to justify the rule. It is stated by the Brotherhood that

the rule had been in existence for upwards of fifteen years, but if it was, it was not enforced until after the Dallas convention in 1921, after which the letter of December 5, 1921, Exhibit P. 4, p. 156, was sent by the Brotherhood to contractors directing their attention to the action of the Dallas convention, and advising them that they should be guided accordingly.

If the friction existed it was easily susceptible of proof and the lack of definite proof must be taken as an indication that it did not exist. The rule that where testimony is within the control of a party and not produced, the inference is against the existence of the fact alleged applies.

> 22 *Corpus Juris*, title "Evidence," sec. 24, p. 81; sec. 55, sec. 56, p. 115;
>
> *United States, ex rel. Vajtauer* v. *Comr. of Immigration*, 273 U. S. 102 (1926), 71 L. Ed. 561, at p. 565;
>
> *Runkle* v. *Burnham*, 153 U. S. 217, 38 L. Ed. 694 at p. 697 (1894);
>
> *Kirby* v. *Tallmadge*, 160 U. S. 379, 40 L. Ed. 463 (1895).

It is passing strange, that if there were any such friction as is suggested, the industry could have been continued with harmony for fifteen years with this rule in existence and *not enforced.*

And so with the other claimed justification for the rule, *i. e.*, that contractors always figure upon the higher wage rate. Defendants here contented themselves with the production of the testimony of Landow (p. 77); Warren (p. 86); Joseph F. Kelly (pp. 112, 116), officials of the union or its locals, who really know nothing about the matter and their statements are opposed to those of Rosenthal, Hass, Mackay and John S. Kelly, who are general contractors and who *do* know and, here, too, if the fact existed, it was easily susceptible of proof.

That the Brotherhood itself did not consider its claim that the so-called national contractors figured on the higher rate as well founded is indicated by the testimony of Joseph F. Kelly (Second General Vice-President of the union). He had testified on his direct examination that contractors who had contracts before the rule went into effect were permitted to operate under the old rule. On cross examination (p. 119) he is asked to explain why it would be unfair to enforce the rule as to contracts already made if it were true that contractors figured on the higher wage scale and he is at a loss for an explanation which explains.

In any event as a remedy for the friction the rule goes much too far. It requires that the foreign employer pay the higher rate whether the employees are *all local men*, or whether they are *all foreign men*. It does not seek to base the discrimination *upon difference of residence of the employees*. It makes a discrimination arbitrarily upon the basis of the place of the main office of the employer.

Joseph F. Kelly cannot give any reason for the discrimination against foreign contractors *who employ all local labor*. He testified page 127:

> "Q Do you know of any reason why if the New York contractors or the national contractor employs all local men the local rate should not be paid? A Do I know any reason where a national contractor pays a local rate or—
>
> Q No. Do you know of any reason why a national contractor who employs all local men that the local rates should not be paid—why the local rates should not be paid? A For the reasons that I have given in saying why this amendment was enacted into our law. I testified to it.
>
> Q It cannot be for all of them because I have eliminated the friction. I am assuming that the national contractor employs all local men. What is the reason why he should pay the home rate? A Well, for the reason that has been advanced, as I

testified to, because of the fact that he generally estimates to pay it and on account of the efficiency that he can get by these local men on the job by the advance in the price."

The testimony of Mackay (p. 98) (painting contractor) is to the effect that the so-called national contractors as a rule employ *all local help* sending only their charge men and the effect of the testimony of Joseph F. Kelly (Second General Vice-President of the union) taken as a whole, is not to the contrary. The charge man in the painting industry is equivalent to a foreman (p. 127).

On page 107 Joseph F. Kelly (official of the union) says:

"A Invariably I would say that they (the national contractors so-called) charge more. I might explain that my reasons for that is that in mostly all instances they have to send their charge men and in a number of cases they have to send their material, their scaffolding and their appliances, and the men that they send generally have to get their board and their expenses, and that is where my knowledge would come in of those contracts being charged at a greater sum."

Now, in addition to *these* extra expenses which the foreign contractor must bear in competition with the local contractor, the Brotherhood desires to add another arbitrary additional expense, to wit, an increase in wages over and above what the local contractor must pay.

In its last analysis, so far as justification is concerned, it comes down to the answer to the question *"Is the locality in which the contractor may have his main office a sufficient ground for discrimination against him with respect to price of labor?"* The question answers itself. And the answer was put in words by Judge White in his dissenting opinion in *New Jersey Painting Company* v. *Local No. 26, etc.*, 96 N. J. E. 632, reversing 95 N. J. E. 108, the dissenting opinion of Judge White being reported in 126 Atl. at p. 403 (not officially reported), four judges

of the Court of Errors and Appeals of New Jersey dissenting.

Even if there were friction in certain cases and even if certain contractors figured on the wage scale of their home city (how they could do this and compete is not disclosed) the unions would not be justified in putting a rule such as this into effect. The fact that there is an evil to be remedied does not justify every method that can be thought of to remedy it. Many ills must be borne. Undoubtedly there is friction among employers because of competition and a sure cure is a combination to prevent competition but that is not permitted because of its effect on others than employers. So, here, if there is friction, a combination, the result of which is injury to employers and to the public, will not be permitted to eliminate that friction.

Specification of Errors.

The assignments of error in the Circuit Court of Appeals are found in the record, p. 36. They are 19 in number but are so numerous only that constitutional questions involved may be properly raised. The case may be argued under four heads:

1. The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood*, 15 Fed. (2nd) 16.

2. The Circuit Court of Appeals erred in declining to consider the merits because the particular work of plaintiff which had been interfered with had been completed under the protection of a temporary injunction.

3. The District Court erred in dismissing the bill and the Circuit Court of Appeals erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b)

The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of plaintiff; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, chapter 746, 26 Statutes at Large, p. 209, Title 15, U. S. C. A. sec. 1, p. 4, making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states, and its supplements and amendments, plaintiff being engaged in interstate trade.

4. The decision of the District Court was based upon the statute of New Jersey heretofore mentioned and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company Case, 96 N. J. E. 632; 126 Atl. 399, and the effect is that the District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the 14th amendment.

ARGUMENT.

I.

The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in Barker Painting Company v. The Brotherhood, 15 Federal (2nd) 16.

The decision of the Circuit Court of Appeals in the case cited was on a review of a decree of a District Court of Pennsylvania declining to grant a *preliminary* injunction.

A consideration of the opinion will indicate that, in the last analysis, the Circuit Court of Appeals based its de-

cision upon the rule that preliminary injunctions will not go unless the right is clear bo upon the law and the fact. In its opinion it devoted considerable space to reference to reasons which *might* be advanced by the union in justification of the rule expressly tating that it did not do so to intimate any sympathy wit the rule "for assuredly we have none."

That there is a distinctionwith respect to the amount and kind of proof which wi induce a court to grant a permanent injunction after full hearing and that which will induce a court to grant preliminary injunction after a hearing only upon affidavitalmost goes without saying.

The distinction is, I thinkas well drawn as anywhere in *New Idea Pattern Co.* v. *Whitner*, 215 Pa. 193, 64 Atl. 518, at p. 520:

> "A preliminary injuction is not, however, to be granted where the plaintiff's right to it is in doubt. 1 Spelling, Extraordinary Relief, sec. 20; Black Lick Mfg. Co. *v.* Gas Co., 139 Pa. 448, 454, 21 Atl. 432, Waring *v.* Cram, Pars. Eq. Cas. 516. The refusal of it does not adjudiate the plaintiff's rights if he can ultimately establish any; it merely denies him an extraordinary remedy properly applicable only to cases in no respect equivocal; Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37, 46."

An application was maden *Barker Painting Co.* v. *The Brotherhood*, 15 Fed. (2nd 16, to this court for a certiorari, which was denied, 2 U. S. 748; 71 L. Ed. 872. It is impossible, of course, fo counsel to know why it was denied, but it may well hae been, the application being for a preliminary injunctio, heard upon affidavits, that it was conceived that, if the matter was to be reviewed, it should be after a final hering, with full opportunity to both sides to adduce all th proofs possible. The decree in the case at bar followed uch a hearing.

II.

The Circuit Court of Appeals erred in declining to consider the merits because the particular work of plaintiff, which had been interfered with, had been completed under the protection of a temporary injunction.

The Circuit Court of Appeals misapprehended the purpose of the bill. It was aimed at the conspiracy to interfere with *any* work of plaintiff throughout the country on which plaintiff did not pay the wage scale of its home town or of the place in which the work was being done, whichever was the higher. The International Union had adopted a resolution directing the enforcement of its rule which required such a wage scale to be paid and to enforce that rule its representatives threatened to interfere with *any* work upon which the rule was not being observed. The bill alleged, and the proofs showed, that the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was so unionized, and all other branches of the building industry in the territory were so unionized, and the agreements between the different branches of the industry were such, as that no painting work could be performed except by union labor for if it was so performed all other branches of the industry would withdraw from the building and it could never be completed and that a contractor could not be "fair" in one place and "unfair" in another, and, if he employed non-union labor on one job, all of his jobs, whether manned exclusively by union labor or not, would be struck throughout the country, and all trades would withdraw from any building job anywhere in the country upon which he was employed.

The bill prayed, prayer 2, p. 16, for an injunction against the defendants *generally* from interfering with *any* work of plaintiff for the purpose of enforcing the rule, and, prayer 3, p. 17, for a decree that the rule may be

adjudged and declared illegal and void, and that all steps taken to enforce and put into effect the rule be adjudged and declared illegal and void.

The National Union had notified all contractors by letter of December 5, 1921, Exhibit P. 4, p. 156, that the rule would be enforced. The bill alleged, and the proofs showed that such an enforcement of the rule would restrict work to contractors local to the territory in which the work was being performed.

The actual interference by the union with the work of plaintiff on the hospital in Somerville was alleged and proven only as indicating that the union meant what it said and as proof of the kind of interference which would be resorted to.

In *Bedford Cut Stone* v. *Journeymen S. C. Asso.*, 274 U. S. 37, at p. 54, and 71 L. Ed. 916, at p. 924, this court said:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears."

And this court quoted among others *Thompson Machine Co.* v. *Brown*, 89 N. J. E. 326-328; 104 Atl. 129, in which case the court said:

> "If the threats, open and implied, of the various users of the machinery and workers thereon, are carried out, there will, unquestionably, be injury. This court does not wait until there is actual injury; it protects against anticipated injury."

In *Vicksburg Waterworks* v. *Vicksburg*, 185 U. S. 66, at p. 82, 46 L. Ed. 808, at p. 816, this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the con-

tract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable."

III.

The District Court erred in dismissing the bill and the Circuit Court of Appeals erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of plaintiff; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, Chapter 746, 26 Statutes at Large, p. 209, Title 15, U. S. C. A., Sec. 1, p. 4, making illegal contracts, combinations and conspiracies in restraint of trade and commerce among the several states, and its supplements and amendments, plaintiff being engaged in interstate trade.

The effect of a decision sustaining the right of the Union to promulgate and enforce the rule here involved.

The far-reaching effect of the adjudication that the union may enforce this rule by strikes, combinations and

boycotts, cannot be over-estimated. If *this* union can promulgate such a rule and enforce it, *all* unions may do the same, and they may, in combination, enforce their respective rules with the result that labor may dictate what employers shall be permitted to perform work in certain localities. If a discrimination can be based upon the place of the employer's main office, it may be based upon whether the employer is an individual, corporation or partnership, and upon the amount of invested capital and upon the net worth and upon the return which the employer has been able to make upon his investment. I submit that no such power can be permitted to exist in any group or groups of men without the destruction of the fundamental principles upon which this government is founded—equality of opportunity.

The Circuit Court of Appeals for the Third Circuit in its opinion in *Barker Painting Co.* v. *The Brotherhood,* 15 Federal (2nd) 16 indicated its lack of sympathy with the rule and also pointed to the divergent holdings in the State and the Federal courts upon the validity of the rule. In its opinion in this case it confessed its "mental disturbance" in reaching the conclusion it had in the first case.

And Judge Buffington dissented in the first case.

The Vice-Chancellor in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, used vigorous language in coming to the conclusion that an injunction should go against the enforcement of the rule. He said:

> "*That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion.* Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the

local and lower scale. This, manifestly, would destroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The New Jersey Court of Errors and Appeals in the same case 96 N. J. E. 632; 126 Atl. 399, based its decision upon the statute of New Jersey, P. L. 1883, p. 36; 3 Comp. Stat. of N. J., p. 3051, sec. 128, reading as follows:

"that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation."

Five judges of the New Jersey Court of Errors and Appeals dissented, and Judge White, in his dissenting opinion in 126 Atl. at p. 403 (not officially reported), said:

"*The place of residence of the contractor is not in any way germane to the wage scale he should be required to pay.* If he attempts to do work where there is no established wage scale, his employees or their organization for them, may fix the wages at which they are willing to work and he cannot complain; but where, as here, his employees' organization has fixed the wage scale for the locality involved, they may not, it seems to me, boycott him by providing that because he does not personally live in that locality, but, as here, lives in some other city or state, he shall because of that reason alone be required to pay a higher wage scale. *The place of residence of the contractor not being germane to the subject of the wage scale he may be required to pay, any discrimination made against him founded upon such place of residence alone is in principle a boycott, and is unlawful.*"

"This principle was thought so important by the framers of our Federal Constitution that they provided in that instrument against any such dis-

> crimination by any state against the citizens of any other state, and it seems to me a curious condition which, while denying to the sovereign states themselves this privilege of invading the equal rights of the citizens, *should accord such right of invasion to the Star Chamber Ex parte Committee which met in Dallas, Texas, in the year 1922, and promulgated the rule here in question for the government (under penalty of strike) of all the citizens of all of the states.*"

In reaching its conclusion that the statute permitted the enforcement of such a rule as this by strikes, etc., the Courts of Errors and Appeals of New Jersey overruled its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 218; 79 Atl. 262 and construed the statute in such a way as to render it offensive to the provisions of the 14th amendment to the Constitution of the United States as will be hereinafter argued.

The cases in which the challenged rule has been considered.

The first case was *New Jersey Painting Company* v. *Local No. 26, etc.*, in the Court of Chancery of New Jersey, 95 N. J. E. 108, 122 Atl. 622, in which Vice-Chancellor Backes held the demand of the Union unreasonable and discriminatory and said (p. 110):

> "*The assigned reason as a justification in law for the strike is manifestly without merit.* In its self-serving pursuit the union entirely overlooked the effect of its action upon trade, and the consequences to the employers of labor. It cannot be denied that the union may arbitrarily fix a uniform scale of wage applicable to all its members, or that it may *classify its members* and arbitrarily fix a uniform scale based on qualification, or that it may localize such uniform scale, and strike to enforce its demands, however oppressive they may be, and the strike will not be interfered with by the courts if it is lawfully carried on. The reason-

ableness or unreasonableness of the demands would not be regarded as a justifiable question, but one to be fought out by capital and labor by their own methods and with their own weapons. National Protective Association *v.* Cumming, 170 N. Y. 315; Bossert *v.* Dhuy, 221 N. Y. 342; Gill Engraving Co. *v.* Doerr, 214 Fed. Rep. 111. But it cannot be admitted that the union may, after having set up wage scales for its members in their various localities, and which employers of labor must abide by, and reckon with, *discriminate against employers, in the matter of wages, based upon the illusory ground that the employer is not local to the place of work.* Such discrimination would be in unfair restraint of trade, inimical to public welfare and in violation of public policy, and any attempt of the union to impose its will by the coercive means of strike would be *an unwarranted and unlawful exercise of the power of might.* The principle upon which the law interdicts such union activity has been often and clearly expounded by the courts. The authorities are numerous and illustrative. Some of them are: Gompers *v.* Buck Stove & R. Co., 221 U. S. 418; Berry *v.* Donovan, 188 Mass. 353; Pickett *v.* Walsh, 192 Mass. 572; Wilcutt & Sons *v.* Driscoll, 200 Mass. 110; Burnham *v.* Dowd, 217 Mass. 351; United Shoe Machinery Corp. *v.* Fitzgerald, 237 Mass. 537; Haverill Strand Theatre *v.* Gillen, 229 Mass. 413; L. R. A. 1918 C. 813; Grassi Contracting Co. *v.* Bennett, 160 N. Y. Supp. 279; Baldwin Lumber Co. *v.* International Brotherhood &c. 91 N. J. E. 240; Currier & Sons *v.* International Molders' Union, 93 N. J. E. 61; Lehigh Co. v. Atlantic S. & R. Works, *supra. That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion.* Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the local and lower scale. *This, manifestly, would de-*

stroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The next case was *Hass Inc.* v. *Local Union No. 17, etc.*, 300 Federal 894, in which, after referring to the rule and the injury which it would cause, conceding that there had been no threats of force, the court said:

> "That no threats of force have been used is immaterial, for threats of fine and expulsion from the defendant union are just as effectual as threats of force, where, as here, expulsion would mean the loss by the person expelled of the opportunity to make a living at his trade."
>
> "The injury thus inflicted on the outside contractor and the public cannot be justified, since no legitimate interest of the defendants would be furthered by the operation of the rule in question. *It was clearly designed for the sole purpose of excluding outside competition in the home market on the part of outside contractors*, and since the plaintiff has been injured by the operation of the rule he is entitled to an injunction enjoining the defendants from enforcing it. The same conclusion was recently reached by Vice-Chancellor Backes in New Jersey Painting Co. *v.* Local Union No. 26, Brotherhood of Painters, Decorators, Paper Hangers of America (N. J. Ch.) 122 Atl. 622, where the same rule was under consideration, as well as in Barker Painting Co. *v.* Brotherhood of Painters, Decorators and Paper Hangers of America, Supreme Court, District of Columbia, decided April 8, 1924."

The next case was *New Jersey Painting Co.* v. *Local No. 26, etc.*, in the Court of Errors and Appeals of New Jersey, 96 N. J. E. 632, 126 Atl. 399, reversing the same case below, 95 N. J. E. 108, 122 Atl. 622. Five judges of the Court of Errors and Appeals dissented—Justices Kalisch, Katzenbach, Lloyd and Judges White and Gardner. Judge White wrote a dissenting opinion, which is

reported in 126 Atl. 403 (not officially reported) and which, succinctly, states the principle for which I contend.

A careful consideration of Justice Black's opinion for the majority will indicate, I submit, that it is somewhat difficult to get at what the real theory of the court was. The learned justice, at great length, refers to the statute of 1883, p. 36, 3 C. S. of N. J. p. 3051, sec. 128, and indicates that the restriction put upon the language of that statute by the same court in *Jonas Glass Co.* v. *Glass Bottle Blowers Association*, 77 N. J. E. 219, 79 Atl. 262, was not proper, overlooking, that, if the restriction be removed, the statute is unconstitutional because it deprives an employer of labor of his property without due process of law and of the equal protection of the law, guaranteed under the 14th amendment to the Constitution of the United States. *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

The court at p. 639 of 96 N. J. E., 126 Atl. 399, says:

> "But the argument by the complainant, followed by the learned vice-chancellor in this case, seems to be based upon the idea that the union cannot in good faith frame or adopt a rule providing for a *sliding scale of wages to fit ostensibly the varying local economic conditions throughout the United States*, which, in effect, does discriminate against some employers as a class in the matter of wages to be paid. It seems to be based upon the ground that such regulations create an unfair restraint of trade. *The attack is aimed, not at the combination, but at its effect upon the employers.* This is unsound, both legally and economically. (The court does not tell us how or why an attack aimed at the *effect* of a combination is unsound either legally or economically.) In the last analysis the prime object of the rule attacked is to establish a standard of wages."

This is a misconception of the argument of the complainant in that case as is succinctly pointed out by Judge

White in his dissenting opinion, 126 Atl. 403 (not officially reported).

It was not at the framing or adoption of *a* rule which would provide for a *sliding scale* of wages to fit ostensibly the varying local economic conditions throughout the United States at which the attack was aimed in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, but at the *ignoring by the Union of that sliding scale of wages, when fixed, in cases where contractors had their main offices* in localities other than that in which the work was being done, and the use by the Union of the *boycott* to effectuate the rule of discrimination—quite a different thing

The next case was *Marshall* v. *Brotherhood of Painters, Decorators and Paper Hangers of America*, in the Common Pleas Court of Philadelphia, not reported, a copy of the opinion being herewith handed to the court. The court indulged in no reasoning, relying almost wholly upon the opinion of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, and fell into the same error as that court did with respect to the objection to the rule, treating it as a rule "establishing a *sliding* scale of wages to fit ostensibly the varying local economic conditions throughout the United States."

The court assumed to quote from *Hass Inc.* v. *Union No. 17, etc.*, 300 Federal 894. It quoted the language of the court in that case:

> "The effect of the rule in question is to make it difficult, if not impossible, for an outside contractor * * * The injury thus inflicted on the outside contractor and the public cannot be justified, since no legitimate interest of the defendants would be furthered by the operation of the rule in question."

And it then says:

"We do not see how the public can be injured by any such means."

What the court had said in the Hass case was:

"This result has been accomplished by a combination of the defendants to prevent, by means of threats and intimidations, persons who otherwise would be willing to do so from working for such outside contractor, except on terms that make it difficult, if not impossible, for them to compete with local contractors. * * * The injury thus inflicted, etc. * * *"

I had always assumed that the public *is* injured by the elimination of competition. The Philadelphia court seems to have thought otherwise.

The next case was *Douglas & Bros. Inc.* v. *Mallette*, Equity No. 7502, in the Superior Court of Rhode Island, not reported, copy of which opinion is handed to the court. The court followed *New Jersey Painting Company* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, and *Marshall* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, Common Pleas Court of Philadelphia, and it expressed its view that the public was in nowise injured, apparently by the elimination of competition, and also said that it clearly became necessary for the Union to regulate the matter by some rule "because it would seem clear that, from the point of view of the Union, it would be unwise to have different members of the Union *from different localities* working on the same job in the same place, receiving different wages for doing the same work," and it also stated that the Union had obviously had in mind the establishment of a *sliding* scale of wages.

Just why it would be unwise, and what complaint there could be, if different members of the union from different localities working on the same job, received different wages for doing the same work, if in the different locali-

ties from which the members came there was a difference in the cost of living which, in turn, was reflected in the different wage scales, is not made plain. It would seem to be clear that if a man, with a family in New York, living under New York conditions and therefore enjoying a New York wage scale, should be transported to Somerville, New Jersey, he should receive the New York wage, for he is living in New York and obliged to support himself and his family by paying New York rates.

But it is not at all clear that, because this man, who must pay for his living at New York rates, is to be paid upon the New York scale, a local artisan living in Somerville with a rate of wage fixed by the Union in the light of the Somerville cost of living, should likewise receive the New York wage. If he is paid the New York wage, then the difference between the local rate and the New York rate is a gift from the contractor, and ultimately from the public, for the public pays.

Why is it unwise to have different rates of wages? The Union suggests because there may be friction, but I repeat that no probative proof of any such friction has been offered, and although the rule was in existence, defendants claim, for fifteen or sixteen years it was never enforced and work went on harmoniously, and in every case in which injunctions have been granted, the work proceeded harmoniously. Workmen do not labor harmoniously merely because of an injunction of the court. We have not a single artisan called who testifies that he is insisting upon any such rule as is here involved. *The demand does not come from the workmen, but from their leaders.*

Moreover, as I have already pointed out, under the existing rule, *even if the contractor employs all local men, still he must pay, if it be the higher, the wage scale of the locality in which he has his main office. The basis of*

classification is not the locality from which the workmen come.

The rule creates an unjust discrimination among Union members. Six workmen, all from Somerville, may be employed in Somerville, equally divided between two jobs precisely alike—one being erected by a local and the other by a foreign contractor. One set doing the same work coming from the same locality gets a higher wage than the other. What possible justification can there be for this?

The court also indicated that because it was not the *purpose* of the rule to discriminate, there could be no relief. Acts are judged by their effect and not their purpose, as will be hereafter argued.

The court also fell into the same error, as did the New Jersey Court of Errors and Appeals, in *New Jersey Painting Co.* v. *Local No. 26, etc., et als.*, 96 N. J. E. 632, 126 Atl. 399, *i. e.*, that the complaint was against the establishment of a *sliding* scale of wages, whereas it was against the establishment of a sliding scale of wages and the ignoring of that sliding scale of wages because a contractor happens to have his main office in another district.

The next case was *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paper Hangers, etc., et als.*, in the District Court of the United States for the Eastern District of Pennsylvania, in which the court denied a preliminary injunction with the statement that it agreed with the reasoning and conclusions in *Marshall* v. *Brotherhood of Painters, etc.*, in the Common Pleas Court of Philadelphia, and in *Douglas & Bro.* v. *Mallette*, in the Superior Court of Rhode Island, and in *New Jersey Painting Co.* v. *Local No. 26, etc.*, 96 N. J. E. 632, 126 Atl. 399. That case came to the Circuit Court of Appeals of the Third Circuit and the decision was affirmed in 15 Federal 2nd, p. 16, Judge Buffington dissenting (p. 19.) The ap-

plication was for a preliminary injunction and the court said:

> "In this proceeding the burden of justifying the rules does not rest on the respondents; it is for the complainant, *who pressed for a preliminary injunction before the answer was filed,* to establish that the rules are unlawful by evidence sufficient to invoke that *extraordinary* remedy."

The court, after indicating that there *might* be justification for the rule, instancing certain matters which might be taken into consideration said:

> "We advert to these possibilities, certainly not to express our views nor to intimate sympathy with the rules,—*for assuredly we have none*—nor to suggest arguments in their support or reasons justifying their promulgation, but merely to show that many variable and intangible factors inevitably enter into the situation, making the injunctive process of doubtful propriety and legality. * * * Because of many unknown factors and the uncertainty of what would be the consequences to both employers and employees of a ruling of the nature sought by the complainant, the case is far from clear."

The net effect of the decision of the court was that the plaintiff had not satisfied it by clear and convincing proof, that it was entitled *to a temporary injunction.*

Judge Buffington dissented and pointed that

> "Enforced as they (the rules) will be by the affirmance of this case, the rules shut out a citizen of the United States from fair competition in Philadelphia business simply because he is a resident of New York State, and give to this competitor a monopoly of that business because he is a resident of Pennsylvania."

An application for a writ of certiorari from the Supreme Court of the United States was denied, 273 U. S. 748, 71 L. Ed. 872. In the instant case, an appeal from a final decree, reliance is placed in justifying the rule only upon

the elimination of friction which is not proven to have existed, and the fact that defendants *believe* that foreign contractors figure on the higher rate for labor. None of the other reasons, which are referred to by the Third Circuit Court of Appeals in 15 Federal, 2nd, at p. 18, are availed of. That court said (p. 18)—

> "If he (the foreign contractor) pay a higher rate to the home laborers and a lower rate to the local laborers, trouble will inevitably follow."

The complete answers are: for fifteen or sixteen years there was harmony; if there had been any trouble it would have been perfectly easy to introduce probative evidence to the effect and none was offered; after the Union determined to enforce the rules, when injunctions were granted, the laborers continued to harmoniously work; there is an economic reason why the rate paid to the artisan brought in from a foreign district should be that of the foreign district, whereas, the artisan hired on the spot should be paid the rate of the locality from which he comes, and it is not to be assumed, at least without proof, that there is going to be friction among union laborers because of a difference in wage scale when there is an economic reason for that difference, as men are supposed to be reasonable; there was no evidence that on this job any different rate of wages was applied to laborers performing the same work; the rule applies whether any "foreign" laborers are employed or not; the difference is not based on the residence of the laborers or the place from which they come but on the locality of the main office of the contractor; if a laborer living in New York works in Somerville for a local contractor he gets the local wage; if he performs the same work for a contractor with a main office in New York, he gets the New York wage.

The Third Circuit Court of Appeals suggested that an argument might be made that the higher wage scale should be paid because, when an employer leaves his locality of

higher wages, he may leave at home laborers unemployed and that the union may "legislate for the continued employment of laborers in varied localities at varied wage rates by providing rules that will measurably insure employment everywhere." This argument is not made, or at least was not in the courts below, and I *do* submit that it would be going pretty far to say that labor may, in order to secure its employment by a contractor in his "home" district, so discriminate, and enforce that discrimination by the boycott, against that contractor when he goes to any other district as to compel him to remain in his "home" district and not take work elsewhere, *for to be effective the power of the Union must go to that extent.* But, even then, it will *not* be effective for *the number of laborers employed in a district does not depend upon the number of contractors in that district but upon the amount of work.* Wherever there is work to be done, there will be found contractors to do it, and, labor in the building industry over the territory which we are discussing being practically 100 per cent. organized, it is quite immaterial (from an economic standpoint) whether contractor A or contractor B performs the work.

The result of admitting any such right in the Union is to admit its right not only to determine that none but union labor shall work but who shall be permitted to contract to do the work.

The remaining suggestion of the Third Circuit Court of Appeals with respect to the influx of laborers and the increase in work at one place or the decrease of laborers and the decrease of work at another place, etc., is not met by the provision of the rule which requires the higher wage scale to be paid, nor is it designed to be met by that provision. It *is met*, as far as it may be, by the provision of the rule which requires the foreign contractor to engage fifty per cent. local help, and that rule is not in dispute in this case. If the Union desires to raise the precentage it

may do so. The matter of "influx, etc. of laborers" is not governed by the "influx of contractors" but by the increase of work. Contractors neither create nor diminish work—work creates and diminishes the contractors.

The next and last case was *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paper Hangers, etc., et als.*, 23 Federal, 2nd 743, Court of Appeals for the District of Columbia. That case went off in the court below and, in effect, in the Appellate Court *because there was in fact no interference by the Union with the men employed by the Barker Painting Company.* The Barker Painting Company inserted advertisements in the local newspapers for workmen, and, in answer thereto, a number of local union painters appeared at the place of work. These men were met, however, by officers of the Union, who informed them that the Barker Painting Company intended to disregard the union rules, whereupon they refused to accept employment and left the place. The court said:

> "In this instance there was no strike or intimidation nor any threat of disorder or interference with appellant's right to employ non-union painters. It cannot be claimed that there was any breach of contract by the men; the latter simply refused to enter into any contract of employment upon the terms offered by appellant. It is certain that appellant could not compel the union painters to work for it upon its own terms, regardless of their consent * * *."

In the case at bar, plaintiff *had* commenced the work and had prosecuted it to the point that it was thirty per cent. complete. Its workmen were proceeding willingly, peacefully and satisfied, when the union officials, because of the rule, ordered them off the work, and it was only because of the active interference of the union officials that they left, and, when the pressure of the union officials was re-

moved by the injunction of the court, all but one returned and he did not remain away because of the rule.

Notwithstanding the fact that the employees of plaintiff were not under contract, it is entitled to their good-will "precisely as a merchant is entitled to the good-will of his customers, although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations." * * * "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was at will and terminable by either party at any time, is of no consequence."

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, at p. 276, citing with approval *Truax* v. *Raich*, 239 U. S. 33, 38, 60 L. Ed. 131; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 749; 9 L. R. A. (N. S.) 254; 118 American State Reporter 727, 65 Atl. 165, 9 Ann. Cas. 698.

In this case the question is *not* whether union employees may cease from work because the rule is violated nor is it whether officers of the Union may step between employer and *prospective employees* and insist upon compliance with the rule; it *is* whether, the relationship of employer and employee having been established, with the mutual assent of both parties, the officers of the Brotherhood may direct the severance of the relationship upon penalty that, if the orders are not obeyed the employee

either lose his membership or be fined, the loss of the membership meaning that the employee cannot obtain work at his trade anywhere, at least within the states heretofore mentioned, due to the unionization of the industry.

The proof showed in *Barker Painting Co.* v. *Brotherhood, etc.*, 23 Fed. (2nd) 743, that non-union labor might be obtained in Washington and the element of power of the Union due to the fact that the trade was practically 100 per cent. unionized was not present—as it is in the case at bar.

Upon the application of the Sherman Act, the court held that the union was protected by section 6 of the Clayton Act. But, I submit, that, in so holding, the court ignored the effect of the decision of this court in *Truax* v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254.

The court expressed the view that it did not think that the regulations were discriminatory, unreasonable, arbitrary or oppressive. It stated that the higher wage and shorter week rules were adopted by the Brotherhood prior to the year 1913; the fifty per cent. rule in 1922; and "they have been in force ever since."

The evidence in the case at bar shows that the rule, with respect to the higher wage rate and shorter hours, was not enforced prior to the Dallas convention of 1921, which led to the sending out of the letter of December 5, 1921, Plaintiff's Exhibit P. 4, p. 156, and that it had not been enforced is impliedly conceded by defendants' witness Joseph F. Kelly, the Second General Vice-President of the Brotherhood, when he says that, even after the Dallas Convention of 1921, *the rule was not enforced with respect to contracts which had been made before the notice of the Union of December 5, 1921*, Exhibit P. 4. He says that it would have been unfair to have enforced it with respect to those contracts (p. 118).

The court further said:

> "They (the rules) are designed to meet a situation which without regulation would be productive of confusion and disorder for union labor. The cost of living is higher in some places than in others; therefore union wages vary in different localities. If a contractor employs union labor upon work in his own city, he must pay the union wages of that locality; but, *if he moves his force of local labor* to another city, he may meet there with a higher or lower union wage scale, as well as with different limitations as to periods of labor. It was to meet these contingencies that the rules now in question were adopted; and this case does not involve their wisdom, but only their legality." (Suppose he does not move his force but employs local labor. Then why should he pay the wage scale of the locality in which he has his main office, assuming that to be the higher?)

I have already indicated that there is not in this case any evidence whatever that, in the absence of the rule, there was any confusion or disorder; the evidence is to the contrary.

The statement of the court that the contractor must meet different conditions in different places may be a statement of fact but the court does not indicate how the fact affords any justification for the rule.

While it may be true that the case does not involve the *wisdom* of the rule, it *does* involve more than its legality for there is in the case the question as to whether, *by combination, a boycott may be put in motion against Barker to enforce a rule* which, as applied to Barker, is wholly unreasonable. The court continues:

> "The rules do not discriminate against any particular person or place, and are uniform in their operation throughout the country."

It is not clear, I submit, how the effect of the discrimination is any less injurious or violative of Barker's rights

because it is not directed at it individually but at it as a member of a class *arbitrarily created.* If the rights of but one person were involved it would, except for the principle, be of little public importance whether the business of that one person was ruined. The fact that the discrimination extends to more than one has never been held to justify *arbitrary* discrimination. The extent of the discrimination indicates its public importance. What the court, undoubtedly, had in mind, as did other courts dealing with the same question and making the same statements, were those cases which have suggested that malice is a necessary element before the court will interfere in cases of this kind. I will deal with that subject later and content myself here with the statement that the recent authorities all hold that "malice," when used in this connection, means but an act performed without lawful justification.

W. A. Snow Iron Works v. *Chadwick,* 227 Mass. 382, 116 N. E. 801;

A. & L. Mfg. Co. v. *Carpenters' Council,* 308 Ill. 488, 139 N. E. 887;

Toledo A. A. & N. M. Ry. Co. v. *Pennsylvania Co.,* 54 Fed. Rep. 730;

Martin on the Modern Law of Labor, published in 1916, p. 34, etc.

An application made for a writ of certiorari from this court was denied, 276 U. S. p. 631, 72 L. Ed. 741.

The Opinion of the District Court.

The decision of the District Court was rendered prior to that of the Circuit Court of Appeals in *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers, etc.,* 15 Fed. 2nd, 16, and the decision in the *Barker Painting Co.* v *Brotherhood of Painters, Decorators, Paperhangers, etc.,* in the Court of Appeals for the District of Columbia, 23 Fed. 2nd, 743. It is found

on p. 20 of the state of case, and is reported in 12 Federal 2d, 945.

The court below quoted copiously from the opinion of the majority of the Court of Errors and Appeals of New Jersey in *New Jersey Painting Co.* v. *Brotherhood of Painters, etc.*, 96 N. J. E. 632, 126 Atl. 399, and, in effect, based its conclusion upon the statute of New Jersey, P. L. 1883, 3 Comp. Stat. of N. J. 1910, p. 3051, sec. 128, which statute I will argue, if construed to permit the conduct of the Unions, is in contravention of the 14th amendment to the Constitution of the United States as well as of the Constitution of New Jersey.

The court noticed the argument that the mere fact that one or any other number of workmen may refuse to work for any reason, or for no reason, does not justify a combination, to, in effect, boycott by agreeing to decline to work, but stated that the trend of modern economic usage, both as practiced and as given expression in the courts, is increasingly against regarding combinations among laborers as unlawful *per se*, narrowing condemnation to those combinations which are formed for the purpose of effecting an unlawful object, or the doing of a distinct injury to one against whom the activities of the combination may be directed. I submit that the court has, in effect, treated as lawful a combination to effect *any* object which an individual acting alone might effect, which is *not* the law.

Gompers v. *Buck's Stove & Range Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, 805;

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260;

Quinn v. *Leathem*, 1901, App. Cases 495;

Pickett v. *Walsh*, 192 Mass. 572, 78 N. E. 753, at p. 757.

Plant v. *Woods*, 176 Mass. 492, 57 N. E. 1011;

A. T. Stearns Lumber Co. v. *Howlett*, 157 N. E. 82, 260 Mass. 45.

The court below also seems to have given weight to the intimation contained in the majority opinion of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 126 Atl. 399, 96 N. J. E. 632, to the effect that "The attack is aimed, not the combination, but at its effect upon the employers. This is unsound, both legally and economically."

Both courts, I submit, overlooked the fact that the question as to the legality of the combination, or rather as to whether a civil wrong is committed *by* the combination, is determined by the *effect* produced upon those against whom the act is directed and by the application of the principle *sic utere tuo ut alienum non laedas*, as the Supreme Court of New Jersey said in *Delaware and Raritan Canal Co.* v. *Lee*, 22 N. J. L. 243, at p. 247, and as this court said in *Hitchman Coal and Coke Co.* v. *Mitshell*, 245 U. S. 229, 62 L. Ed. 260.

There are but few acts which are inherently right or wrong. An act is denounced as a crime, or as a civil wrong, because of its *effect* upon others than the perpetrator of the act.

Every combination, and the acts of every combination, would be lawful were it not because of the effect upon others than those parties to the combination and to the acts. Why not?

In considering the object of the rule, the District Court said (p. 29) that in the minds of those who framed its terms there was one main plan—"that of *increasing* wages under certain conditions therein named. Whatever dispute there may be regarding these conditions, the fact must remain that there was in contemplation their utilization as a basis for wage increase."

And the court then went on to state that "the quest for increased wages is a lawful object."

I submit that the court fell into error when it stated that the object of the rule was to *increase* wages. No such object is expressed in the rule nor is that object given as justification for the rule by the officials of the Union who testified in this case. The court determined the *object* of the rule by *its effect in certain cases.* It is true that, in *certain* cases, *certain* workmen may receive, for the time which they work for the particular foreign emloyer, a higher wage but *that* was *not* the purpose of the rule. One might as well argue that, because the effect of this rule is to compel Barker to pay a higher rate of wage than a contractor local to the place in which the work is being done, *it was aimed particularly at Barker.*

The District Court then proceeded to say that the unlawfulness of the acts must be found either in the residential feature of the rule, or in the methods adopted in the attainment of the object, or in the effect which such attainment has produced.

In considering the methods used to effectuate the object the court indicated that the record is barren of any showing of intimidation, violence, or disorder of any sort and that that feature may safely be eliminated.

While there was no evidence of violence or disorder there *was* evidence of intimidation. The District Court overlooked the fact that it has been uniformly held that there may be intimidation without violence.

Barr v. *The Essex Trades Council,* 53 N. J. E. 101, 30 Atl. 881;

Toledo A. A. & N. M. Ry. Co v. *Pennsylvania Co.,* 54 Fed. Rep. 730, opinion by Judge Taft;

Truax v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;

Duplex Printing Co. v. *Deering,* 254 U. S. 443, 65 L. Ed. 349;

And many other cases.

It is not possible, I submit, to urge that there is no intimidation when the penalty which would be visited upon workmen who persisted in working against the order of the Union leaders, would be dismissal from the union, in which event they would lose the right to earn a livelihood at their trade, or a fine, and it is not necessary for a threat that it be expressed in words. It is sufficient that it be understood.

See the cases above cited and *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497; 42 L. R. A. 407, at p. 416.

But, I submit that the court has overlooked another factor to be considered, *i. e., the factor of combination* and this involves the argument that has already been, and hereafter will be, made that, *while one or any number of the workmen may quit for any reason, or for no reason, the combination to quit is unlawful under the circumstances of this case.*

Upon the matter of the legality of the classification the District Court said:

> "Had the rule in question drawn a specfic line of demarcation, basing its operation avowedly upon differences in state citizenship, I can conceive that such differentiation would constitute an unlawful and forbidden discrimination; but as I read the rule, it is not subject to that interpretation, concerning itself in nowise with state lines, but applying to anybody and everybody who essays to do business outside of his home city, whether it be in a neighboring town in his own state, or in some distant foreign jurisdiction."

And the court said that, because of that fact, the rule is free "of the charge of effecting an unlawful discrimination."

While it is true that the basis of classification is not on *State* lines, the *effect* is to discriminate against con-

tractors coming from a foreign state, but the objection is not only that there is a discrimination against contractors coming from foreign states, but also that the classification is wholly based upon the locality in which the contractor may have his main office, *which has no reasonable relation to a wage scale* as pointed out by Judge White in his dissenting opinion in *New Jersey Painting Company* v. *Local No. 26,* New Jersey Court of Errors and Appeals, 96 N. J. E. 632; 126 Atl. 399, at p. 403.

The District Court, while conceding the rule that the classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" suggested that the classification in this case has a reasonable relation to the subject matter for the reason that "yet, even so, it can hardly be urged as a general proposition that the matter of residence is one not germane to the question of wages, since it is, in a real sense and under all ordinary conditions, the controlling factor. A contractor, living and doing business in a small town, pays his workers the union wage scale established for that town. Eventually, and of his own accord, moving his business and establishing it in a large city, he accepts the altered conditions and pays the identical staff of workers the enlarged rate of the metropolis, for which the change of his 'home city' has come the consequent change in the stipend of his workers."

But the learned court must have been here referring not to a "contractor" but to a "manufacturer." It is quite true that when a *manufacturer* changes his "home" city, he changes his rate of wages, *either lower or higher,* if there be a difference, but that is because he removes *his entire* business to the new "home city" and his workmen, who are employed in the "home city" live in the "home city." It is not the change of the "home city" of the

manufacturer which makes the change in wage. It is the fact that the work which is now performed for him is performed in a "new" city. It is the place of the *performance of the work* which governs the wage scale and that is because the workmen are obliged to meet the living conditions of the place in which they perform their work, the living conditions being the determining factor in a wage scale.

But a painter or a building contractor does *not* perform his work at the place of his "home city." On the contrary, in his "home city," all that he may have is an office and *all* of his work may be performed outside of his "home city," and in places far remote.

Just as in the case of the manufacturer who moves his plant from one city to the other—the place of his plant, where the work is performed, should be the place determining the wage scale, so in the case of a contractor who has his work performed by labor outside of his "home city"—the place of performance should be the determining factor in the wage scale.

The District Court said:

> "The natural effect of all of the foregoing is to equalize, at the higher rate, the wages of all workers employed under the conditions set out in the rule under review, and thus, as it appears to me, the object and effect of the rule are lawful, as are also the foundation laid and the means relied on for its enforcement."

It is quite true that the effect of the rule is to equalize wages, at the higher rate, but the equalization is based upon a difference which has no relation whatever, economically, to the wage scale.

(a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law;

(b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the Union to enforce it by combination is unlawful and a violation of the rights of plaintiff.

Considerable of the argument applicable to this has already been made. There are, however, certain principles of law to which reference should be made with their particular application to the case at bar.

This case may be argued to be one of *primary* boycott. There are *directly* involved, only the particular workmen employed by plaintiff, but there is superimposed, not only a rule adopted by *all* persons engaged in the painting industry, but an interference by Union officials (representing not only the painters' union but others) with the workmen of plaintiff, the only persons *directly* involved, who were working harmoniously with it despite the rule, and the compulsion of those union officials upon the workmen of plaintiff to comply with the rule under penalty of a fine or loss of membership in the organization, which would mean the loss of opportunity to make a livelihood. The general law of boycott is of importance.

Many of the courts, including the courts below, I submit, have fallen into the error of assuming that, because an act may be performed by one, it may be performed by many in combination and the mere fact of combination, plus compulsion brought by the combination as such, upon the individual members of the combination to comply with the demand of the combination may not, in and of itself be sufficient to render the acts of the combination illegal.

The law of boycott as applied to the case at bar.

In the very first case in this country in which the word "boycott" was used, *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Amer. St. Rep. 23, the Connecticut court said (at p. 895 of 8 Atl. Rep.):

> "It is also a combination of many to impoverish and oppress a few. The weaker party needs and must receive the protection of the law. If in any case it is criminal for many to combine to do what any one may lawfully do singly, it would seem that this would be such a case. Numbers can accomplish what one man cannot—evil as well as good; and that is the reason of the combination. The law encourages combinations for good, and combinations by workmen to better their condition by legitimate and fair means are commendable, and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal and cannot be regarded with favor by the courts. But combinations for good purposes may be perverted, and when their power is sought to be used to harm their fellowmen, to deprive others of their just rights, then, *not the combination, but the use of it becomes criminal.* In such use there is a large element of wantonness and malice. Any one man, or any one of several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase."

And the court further said, p. 894:

> "As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, *and therefore it was malicious.*"

In *Quinn* v. *Leatham*, in the House of Lords of England (1901), Appeal Cases 495, 1 British Ruling Cases, 197, at p. 232, Lord Brampton said:

> "Much consideration of the matter has led me to be convinced that a number of actions and things

not in themselves actionable or unlawful if done separately without conspiracy *may, with conspiracy, become dangerous and alarming,* just as a grain of gunpowder is harmless, but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in large quantities, with a view to harm, may be fatal as a poison."

And Lord Macnaghten said (p. 213):

"That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, *L. J.* and Lords Bramwell and Hannen in the Mogel case, (1889) 23 Q. B. D. 598 (1892) A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors; but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong."

And the House of Lords in that case considered the prior case of *Allen* v. *Flood* (1898), A. C. 1.

The effect of the decision of *Quinn* v. *Leatham* is that the gist of the action is *not* the malice but the *effect* produced, or sought to be produced, by the combination upon the rights of others. When the courts use the term "malice" they mean only the absence of a just cause or excuse, not for the act performed, but for the *effect* produced.

This court in *Gompers* v. *Buck Stove & R. Co.* (1911) 221 U. S. 418, 55 L. Ed. 797, at p. 805 said:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence

of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

In *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260 (1917) this court recognized the effect of numbers when it said at p. 279:

> "It was one thing for plaintiff to find from time to time, comparatively small numbers of men to take vacant places in a going mine; another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers."

And in *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753, at p. 757, the Supreme Court of Massachusetts said:

> "In addition to the limitation thus put on labor unions *there is a fact which puts a further limitation on what acts a labor union can legally do.* That is the increase of power which a combination of citizens has over the individual citizen. * * *"
>
> "The result of this greater power of coercion on the part of a combination of individuals is that *what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in* another way, *there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do.*"

And see *Plant* v. *Wood*, 176 Mass. 492, 57 N. E. 1011 (1900).

A. T. Stearns Lumber Co. v. *Howlett*, 260 Mass. 45; 157 N. E. 82 (1927).

Neither the fact that the act is one which may properly be performed by a single individual nor the fact that the object has some reference to wages, hours or working conditions, is determinative of the legality of the acts of a combination.

The right of a single union man to refuse to work with a non-union man is conceded.

The maintenance of a closed shop has a direct bearing upon both wages and terms of employment but a strike, as a result of a combination to enforce a closed shop over a wide territory, is unlawful, although the right of an individual not to work in any but a closed shop must be conceded.

Baldwin Lumber Co. v. *Int. Brotherhood of Teamsters*, 91 N. J. E. 240, 109 Atl. 147 (1920);

Connors v. *Connolly*, 86 Conn. 641, 86 Atl. 600, (1913);

Curran v. *Galen* (1897), 152 N. Y. 33, 46 N. E. 297;

Lehigh Structural Steel Co. v. *Atlantic Smelting & Refining Co.* (1920), 92 N. J. E. 131, 111 Atl. 376;

McCord v. *Thompson-Starrett* (1910), 113 N. Y. Supp. 385, affirmed 198 N. Y. 587, 92 N. E. 1090;

Folsom v. *Lewis* (1911), 208 Mass. 336, 94 N. E. 316.

The right of a single union man to refuse to work with a non-union man is conceded and that right has a relation to the terms of employment but an agreement to compel an employer to discharge a non-union man at the request of the union is illegal.

Berry v. *Donovan* (1905), 188 Mass. 353, 74 N. E. 603.

The right of a union man to refuse to handle material sold by any particular person may be conceded, but an

agreement among union members to so refuse to handle such material is unlawful.

Burnham v. *Dowd*, 217 Mass. 351; 104 N. E. 841 (1914);

A. T. Stearns Lumber Co. v. *Howlett*, 260 Mass. 45, (1927), 157 N. E. 82;

J. D. Loizeaux Lumber Co. v. *Carpenters' Local of Roselle, N. J.*, N. J. Chancery, opinion by Vice-Chancellor Buchanan, unreported, opinion handed to the court.

The matter of employment of apprentices has reference to the terms of employment, nevertheless a combination to protest against the employment of an employee as an apprentice on the ground that it is a breach of one of the rules of the association is illegal.

Read v. *Friendly Society of Operative Stonemasons* (1902), 2 K. B. 732, 1 British Ruling Cases, 503.

The number of men employed by an employer not only has reference to the terms of employment but also to the matter of wages, nevertheless a rule of labor union requiring the employment of a minimum number is unlawful.

Haverhill Strand Theatre Co. Inc. v. *Gillen* (1918), 118 N. E. 671, Massachusetts Supreme Court, L. R. A. (N. S.) 1918 C. 813, 229 Mass. 413.

Collective bargaining goes to the terms of the employment but a strike to enforce it is unlawful.

United Shoe Machinery Co. v. *Fitzgerald* (1921), 237 Mass. 537, 130 N. E. 86.

A single white man may rightfully refuse to work with a colored man, but a combination of white men to refuse to work with a colored man is illegal.

It is not always true that men may quit work for any or for no reason.

It is necessary to cite but one case.

In *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.* (1893), Circuit Court, Northern District of Ohio, before the late Chief Justice Taft, then Circuit Judge and Ricks, *J.*, 54 Federal 730, the late Chief Justice conceded at p. 737 that the statement is not always true, and he said:

> "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. *Generally speaking, this is true, but not absolutely.* If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, *the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act.* The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful."

Many cases in which strikes, as such, have been enjoined are in point.

Folsom v. *Lewis*, 208 Mass. 336, 94 N. E. 316;

Baldwin Lumber Co. v. *Local No. 560, etc.*, 91 N. J. E. 240, 109 Atl. 147;

A. T. Stearns Lumber Co. v. *Howlett*, 157 N. E. 82; 260 Mass. 45.

Lehigh Structural Steel Co. v. *Atlantic Smelting & Refining Co.*, 92 N. J. E. 131, 111 Atl. 376;

International Organization v. *Red Jacket C. C. Co.*, 18 Fed. (2d) 839.

The underlying principle upon which the acts of defendants must be held to be illegal.

The underlying principles upon which boycotts are held unlawful are not difficult to ascertain. Every man is entitled to conduct his business freely, and as he chooses, subject, of course, to the maxim *"sic utere tuo et alienum non laedas."* Every man is entitled to labor, or not to labor, for another as he chooses. Every man has the right to deal freely with any other man, and every man has the right to have others deal freely with him. These rights are as absolute as any rights may be, all rights being subject to constraint in the interest of the public. If, in the exercise of the respective rights of the individual, injury is done to others, the injury is *damnum absque injuria.* But there is no absolute right of individuals to act in concert. *The right to act in concert is a qualified right.* Whether it may be exercised or not depends upon the *effect* which it may have upon the nearly absolute rights, qualified only by the maxim before mentioned, of individuals outside the combination. If the effect of the act performed in combination is to unduly injure the public, or the absolute rights of individuals outside of the combination, then, *because of that effect,* the act of the individuals in combination may be prevented, although each individual acting separately, may have performed the act free from interference. *The underlying principle is that there is no absolute right to act in combination.*

The right of a single individual to refuse to work for John Jones, except at the rate of fifteen dollars a day, and to refuse to work for John Smith except at the rate of ten dollars a day, and to agree to work for Robert Roe at the rate of five dollars a day is conceded. The reason that he may so discriminate is *not* because the discrimination is based upon a matter of wages but because he may refuse to work for any one of the three for any reason

whatever. The fact that the discrimination is accomplished by a difference in a wage demand adds nothing to the right. But can it be that *all* workers, or any considerable number of workers in a community may *combine* to refuse to work for John Jones except at the rate of fifteen dollars a day, and to refuse to work for John Smith except at the rate of ten dollars a day and to agree to work for Richard Roe for five dollars a day? Does the fact that the discrimination is accomplished by means of a wage demand justify *the combination to discriminate?* It must be conceded that the right to discriminate, so far as the individual is concerned, for an arbitrary cause or for no cause, is just as broad as the right to discriminate because of a matter of wages. It likewise must be conceded that a combination to discriminate, in the manner in which I have pointed out is illegal if the cause be arbitrary. Does the fact that the basis of discrimination has reference to wages justify it? If it does, then, indeed, labor unions are possessed of a weapon *by which they can determine the persons engaged in an industry who shall do business and who shall not.* Can this be?

In considering this matter we must search for the reason why, although an individual may perform certain acts and any number of individuals may perform the identical acts, they cannot do so *by agreement.* The reason is *not* that each individual in the combination has not the absolute right to perform the acts but the *effect* of what they do by agreement upon others.

Otherwise stated, it is not a denial of the right of the parties to the agreement to do the things they do, but a denial of the right to exercise that right in combination because of the *effect* of the exercise of the right upon the relative rights of others. Why is it that a union cannot insist, by agreement, upon a minimum number of workers? It is because of the *effect* upon the business of the employer. Why is it that a union is not permitted to strike

to enforce a closed shop over a wide territory? It is because of the *effect* upon the non-union man. Why is it that a combination is not permitted to compel the employment of a union foreman? It is because of the *effect* upon the business of the employer. Why is it that a union is prohibited from interfering with non-union employers of a shop in order to unionize a non-union shop? *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260. It is because of the *effect* upon the business of the employer and the *effect* upon non-union workers. Why is it that an agreement to refuse to handle materials sold by one who furnishes supplies to an employer of non-union labor is prohibited? It is because of the *effect* upon the employer, the *effect* upon the person who sells the material manufactured by non-union labor, the *effect* upon the non-union men who work for that employer and the *effect* upon the public.

It is not yet necessary to pass upon the question whether or not a combination of individuals may be permitted to insist upon payment to them of a wage which is outrageous based upon no economic ground and destructive of employers as a whole. The time may be coming when *that* question will have to be dealt with and, when it comes, there is no doubt but that the courts will deal with it by applying the maxim *sic utere*, etc. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165; *Cyrus Currier* v. *International Molders*, 93 N. J. E. 61, 115 Atl. 66.

The right of workers to combine to refuse to work except upon a certain scale of wages is the result of growth.

A history, somewhat incomplete, is given in Eddy on Trade Combinations, commencing at sec. 419 and running to sec. 444. There was dispute at one time in England whether such a combination could be formed at common law, and statutes were finally passed making it lawful. There were cases in this country in which it was held that,

under the English common law, such combinations were unlawful. A consideration of the history will indicate that the growth was a matter of economic conditions and it was finally determined that there might be such a combination. But the reason of it was, as stated by Eddy, who wrote in 1900, sec. 444, p. 323:

> "It is better for the law to leave employers and employees free to form such associations as they please in relation to rates of compensation so long as the associations are voluntary. These associations will act upon each other; if the employees demand too much or the employers offer too little, such condition cannot continue for long or be productive of any serious inconvenience to the community, as that side must ultimately give way the demands of which are not founded in reason and justice. Where, however, combinations are formed to intimidate employers or to coerce other employees, *it matters little what are the measures adopted, if the object is to interfere with the rights of others and to control their free action, such combination is illegal.*"

There have been many changes since 1900, and, as the law as it was laid down in 1900 was the result of growth, changing from time to time, it is not and never can be considered static, but must remain capable of growth to cope with new conditions and I have no doubt but that, were there a labor union in this country strong enough to enforce upon employers an outrageous demand for wages, which would have the effect of doing injury to the public, and the economic conditions were such as that the balancing of association against association, as indicated by Eddy, would not work, the law would find a way to cope with the situation.

But that is not the situation here. This is *not* an attempt to compel employers *generally* to pay a certain wage. It is an attempt never before tried, so far as my examination of the books discloses, *by agreement to discriminate in the demand for wages between certain employers.*

There is injected in it the idea of *discrimination* which was not present in any of the cases referred to by Eddy or which I can find.

If the workers have the right to, by combination, discriminate in matter of wages as they have attempted in this case, *there is no limit to their power to advance one employer and to destroy his competitor.* Such a discrimination is abhorent to every idea of equality upon which the American government is founded.

It is a violation of the fundamental idea expressed in the 14th amendment to the Constitution of the United States and in the first section of the Constitution of New Jersey. It is not contended but that one man may discriminate. He may, for any reason or for no reason, but just as there cannot be an agreement to refuse to work for *no reason* so that can be *no agreement to discriminate,* using as a weapon of the discrimination a matter of wages. The illegality arises not, as has been stated, because of the combination but because of the *effect* of the combination upon the employers, that *effect* being produced by the greater power of the combination and, as Eddy says, it matters little what are the means adopted if the object is to interfere with the rights of others and to control their free action. Against the right of the workers to combine in matter of wages stands the right of the employer, as a citizen of the United States and of the State wherein he resides and as a man by nature free and independent with certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness, and whether expressed in words or not, embodied in the very fabric of our institutions, to be free from unjust discrimination.

This Court has indicated that there are certain acts which may be so abhorent to the fundamental concept of

our government as that one may be considered as protected against their performance under the constitution although the right is not clearly expressed in the constitution.

Pierce v. *Society of Sisters, etc.*, 268 U. S. 510; 69 L. Ed. 1070.

It is one thing for a combination of employees to be formed to deal with a combination of employers on matters of wages, where the employers are to be treated as one group and the employees as another, but when the combination of workers seek to make distinction *between the employers* then the check stated by Eddy fails.

If the law is as stated by the District Court then any union organization operating throughout the country may arbitrarily ordain discrimination as against employers, based solely upon their residence, and not only may any union do this thing, but *unions may combine,* and the combination, which may control all labor throughout the United States, may arbitrarily establish such discrimination. By this means all employers of labor may be driven out of a community except those who may have their residence therein. If discrimination is justified against non-residents, the conclusion cannot be escaped but that discrimination may be directed against residents, and all resident employers in a community may, by concerted acts of the union, be driven out of the community in which they reside in favor of non-residents. Not only may discrimination as to residence be based upon State lines, but county lines, or such arbitrary districts as the union may set up. A resident of the County of Essex, New Jersey, doing work in the adjoining County of Hudson, New Jersey, may be obliged to pay higher wages than a resident of the County of Hudson, New Jersey, doing work therein, and a resident of the adjoining County of Bergen, New Jersey, may be obliged to pay still higher rates.

If such a right is to be accorded to combinations of labor upon the theory that they have labor to sell for a price, and that must be the theory, then I submit that a similar privilege must be accorded to the sellers of any other product, and I see no reason, upon principle, why there may not be a combination of those dealing in hardware, or any other article of commerce, to sell at one price to a resident and at a lower price to a non-resident, or vice versa, and the districts may be as arbitrary as the combination of sellers desires to make them.

If this right is to be accorded to combinations of employees it cannot, upon principle, be withheld from combinations of employers (*Coppage* v. *Kansas*, 236 U. S. 1; 59 L. Ed. 441), *and employers may combine to pay one price for labor where the employees come from one district and another where the employees come from another district.*

If combinations may make discriminations based upon the residence of an employer, upon principle, I submit that they may make discriminations between employers based upon *any other ground of distinction which may occur to their minds,* as, for instance, between those who have capital invested of $100,000. and those who have have capital invested of $200,000.; between those who have made eight per cent. on invested capital for the preceding twelve months and those who have made sixteen per cent.; between those who are individuals, partnerships or corporations. Bases of discrimination may be created *ad infinitum*. And this is not fanciful. There can be found greater justification for a difference between the rate of wages to be charged to employers who have an invested capital of $100,000 and those who have an invested capital of $200,000 and those who may be individuals or partnerships or corporations, as the case may be, or between those who have made twelve per cent. on invested capital for the preceding twelve months and

those who have made other percentages, than there is for a difference between those who may have their main offices in one place and those who may have them at another. *Profit sharing may be compelled with a vengeance.* It is hardly necessary to say that if, under the law, such power exists in labor combinations, no amendment to the Constitution is required to permit a complete destruction of property and the establishment of a new social system.

Just as the power to tax includes the power to destroy, so does the power to discriminate and make that discrimination effective include the power to destroy.

C. Defendants are engaged in a conspiracy, in violation of the anti-trust acts, section 1, U. S. C. A., Title 15, p. 4, Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209 (Sherman Anti-Trust Act), Secs. 12, 13, 14, 15, 16 and 17, U. S. C. A. Title 15, p. 148, Act of October 15, 1914, c. 323, 38 Stat. 730 (Clayton Act).

Plaintiff is engaged in interstate commerce within the meaning of the anti-trust acts.

The uncontradicted testimony of Rosenthal (p. 42) is to the effect that plaintiff carries on its business over the United States from New York to Winnipeg, New Orleans to New York to Dallas to New Orleans to Winnipeg; its materials are usually purchased in New York and shipped to different jobs in different states of the union, and then back to New York; large amounts of material are purchased in New York and shipped; some materials are bought on the jobs; as a part of its business it makes contracts for the performance of work all over the United States, the contract, the performance of which was interfered with by the action of defendants, was made for the performance of work in the State of New Jersey; the effect of compliance with the rule will be to exclude

plaintiff from competition with local contractors in different parts of the United States.

The terms "trade" or "commerce" as used in the anti-trust acts are not technical terms. They comprehend every species of commercial intercourse.

Gibbons v. *Ogden*, 9 Wheaton 1; 6 L. Ed. 23;
Kidd v. *Pearson*, 128 U. S. 1; 32 L. Ed. 346.

In *Second Employers Liability Cases*, 223 U. S. 1; 56 L. Ed. 327, this court said:

> "The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers, and property by common carriers, whether carried on by water or land."

In *United States* v. *Eastern States Retail Lumber Dealers' Assn. et als.*, 201 Fed. 581, District Court, Southern District of New York, Circuit Judges Lacombe, Coxe, Ward and Noyes sitting, Circuit Court Judge Lacombe delivering the opinion of the court said:

> "It is now well settled that the words 'restraint of Trade' in that (the Sherman) Act are to be construed as including restraint of competition. Full, free and untrammeled competition in all branches of interstate commerce is the desideratum to be secured."

The decree was affirmed in this court, 234 U. S. p. 600; 58 L. Ed. 1490.

And see *County of Mobile* v. *Kimball*, 102 U. S. 691; 26 L. Ed. 238.

In *Swift & Company* v. *United States*, 196 U. S. 375; 49 L. Ed. p. 518, this court 49 L. Ed. p. 525 said:

> "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit,

after purchase, in another, and when in effect they do so with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

In *Binderup* v. *Pathe Exchange, et al.*, 263 U. S. 291; 68 L. Ed. 308, reversing the Circuit Court of Appeals for the 8th Circuit, this court held that the manufacturing of moving picture films in one State and finding customers for them in another State, making contracts with the customers for their use and transporting the films from the State where manufactured to the State where they are to be used, constitutes interstate commerce even though the films are consigned in the different States to local depositors as agents for the manufacturer.

Marienelli, Ltd. v. *United Booking Offices of America, et al.*, 227 Fed. 165 (District Court, S. D. New York), was a suit for damages under the Sherman Act. The individual defendants owned many vaudeville theatres throughout the United States, arranged in two Circuits, an eastern and a western. The two corporate defendants were booking agents for the two circuits. The defendants entered into an agreement that the Eastern Owners would not employ anyone not booked through the Eastern booking house, and no performers would be employed who played outside of the two Circuits. A similar arrangement was made by the Western owners and the Western booking house. Black-lists were made up by each of the booking houses and these were exchanged between them. There was a demurrer to the complaint. The court said:

"Undeniably certain aspects of the business are interstate commerce, as, for instance, the contracts made by the booking companies under which the performers must go from state to state, throughout the circuit, acting here and there and fulfilling their contracts as much by travel as by the acting. Since

> Hoke *v.* United States, 227 U. S. 308, and Wilson *v.* United States, 232 U. S. 563, it cannot be doubted that this feature of the business was within the complete powers of Congress for such purposes as it might find to the public interest. This moreover, applies as well to that feature incidental to the foregoing, which consists in the carriage of the performer's stage properties and paraphernalia from one state to another, a necessary part of the performance of their contracts with defendants. (Citation.) The same may be said of the scenery and advertising matter sent from state to state by the theatres themselves. In respect of all these details, the business, therefore, consists of interstate commerce."

The same ruling was made by the Circuit Court of Appeals for the Second Circuit in *Fox Film Corporation* v. *Federal Trade Commission,* 296 Fed. 353, and also in *Fox Film Corporation* v. *Trumbull,* 7 Fed. 2d 715, 721.

The Marienelli cases has been approved in:

United States v. *United States Shoe Machinery Co.,* 234 Fed. 127, 144;

Sullivan v. *Associated B. & D. of U. S.,* 272 Fed. 323, 327.

A case which is of the utmost importance I submit is *Ramsey* v. *Associated Billposters, et al.,* 260 U. S. 501; 67 L. Ed. 368, reversing the United States Circuit Court of Appeals for the 2nd Circuit, 271 Fed. 140. This was an action for damages against the Associated Billposters under the Sherman Act. Plaintiffs were solicitors of advertising for customers in many states; they prepared, designed, purchased and sold billposters, and caused them to be displayed by local operators throughout the United States and Canada, contracting with their customers and receiving pay for the entire service of preparing, designing, purchasing and posting the advertisements, and it was held that they were engaged in interstate commerce, and that a combination interfering with the con-

duct of their business was a violation of the Sherman Act. The court said at p. 370 of 67 L. Ed.:

> "Plaintiffs had developed a lucrative and profitable business when, in July, 1911, the Association cancelled their licenses and refused to renew the same. Now, as a result of the defendant's unlawful acts, they are disabled from competing in the markets, and their business is restricted and unprofitable.
>
> The court below held: 'The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. Rep. 40.'"

With respect to this statement of the court below this court said:

> "We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendant's joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. Hopkins *v.* United States is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding noncompetitive prices. The allegations clearly show

the result has been as designed—that the statute has been violated and plaintiff's business has suffered.

This court has heretofore laid down and adequately discussed the applicable principles. (Citing many cases.) The fundamental purpose of the Sherman Act *was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.* The alleged actions of defendants are directly opposed to this beneficient purpose and are denounced by the statute."

In *Aeolian Company* against *Fischer, and others,* United States Circuit Court of Appeals for the Second Circuit, decided April, 1930 (at this writing not reported, but it will be reported in 37 Federal, 2nd), the Circuit Court of Appeals, reversing the District Court 35 Federal, 2nd, 34 held that organ manufacturers who built parts of organs in one State and erected the organs in buildings in another were engaged in Interstate Commerce and that the business of erection was a part of the interstate commerce, and that a combination of unions to call strikes in building trades employed on the buildings in which the organ manufacturers were installing their organs was a conspiracy in restraint of interstate commerce.

The Circuit Court of Appeals relied upon *Anderson* v. *The Shipowners,* 272 U. S. 359; 71 L. Ed. 298 and said:

"The undoubted purpose of the appellees was to monopolize the work with which the appellants were concerned, that is, the installation of organs, and require only their membership or union workers for each job. It restricted the liberty of employers and employees to engage in interstate commerce, whenever the employment of non-union members is involved, and is an interference with interstate commerce. It is immaterial whether the combination is unlawful because it interferes with

the right of non-union men to engage in such part of interstate commerce or with the right of employers of non-union men to so engage; the result is the same. If the combination is illegal for either reason, the person or corporation injured in its or his property rights is entitled to relief. Chattanooga Foundry & Pipe Works *v.* City of Atlanta, 203 U. S. 390; U. S. *v.* Colgate & Co., 250 U. S. 300; Loewe *v.* Lawler, 208 U. S. 274; U. S. *v.* Patten, 226 U. S. 525. The inquiry is not as the court below conceived it to be, whether or not there was a combination to exclude the appellants' organs from interstate trade or commerce. *It is as much a violation of the Sherman Act, as amended by the Clayton Act, for combinations to exclude individuals from work in interstate commerce.* Finding that the installation of the organ was work in interstate commerce and that there was a combination directly to restrict and obstruct that work, the opportunities of engaging therein was work of interstate commerce. But the interference with this interstate commerce was not confined to preventing workmen from engaging in the employment of the appellants as non-union men. There was a combination to obstruct and interfere with the appellants in carrying out their interstate trade and commerce in their usual and practical way which, of itself, was a violation of the act. It is not material or important whether the restraint operates upon this interstate commerce at the point of origin or at the point where it comes to rest. Bedford Stone Co. *v.* Journeymen's Stone Co., 274 U. S. 37; Binderup *v.* Pathe Exchange Inc., 263 U. S. 291; Ramsay Co. *v.* Associated Bill Posters, 260 U. S. 501; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443. The combination formulated by the appellees to curtail the liberty of the appellants and their employees to engage in the phase of the interstate commerce involving installation, was a violation of the anti-trust laws and their refusals to permit non-union men to work and striking to interfere with the work of the appellants in installing organs, was a violation of the anti-trust acts. Duplex

Printing Press Co. *v.* Deering, *supra;* Bedford Stone Co. *v.* Journeymen's Stone Co., *supra.*"

The opinion was by Manton and Chase, *J. J.* A. N. Hand, *J.* filed a concurring opinion.

(2) The conduct of defendants is a combination and conspiracy in restraint of trade within the meaning of the Sherman Act, Section 1, Title 15, U. S. C. A., "Commerce and Trade," p. 4, Act of July 2, 1890, c. 647, 26, Stat. 209 and within the meaning of Section 12, Title 15, U. S. C. A. p. 148, Act of October 15, 1914, c. 323; 38 Stat. 730, sec. 1, Clayton Act, and is not within the protection of Section 17, Title 15, U. S. C. A. p. 210; Act of October 15, 1914, sec. 6.

That the conduct of defendants has the direct effect of eliminating and suppressing competition can admit of no question. The evidence is that the enforcement of the rule will be that painting work will be confined to local contractors. Other than local contractors cannot compete. That the conduct of defendants has such an effect upon interstate commerce as to come within the condemnation of the Sherman Act and is not saved by the exemption provisions of the Clayton Act is, I submit, indicated by a consideration of the following cases:

Bedford Cut Stone Co. v. *Journeymen S. C. Ass'n,* 274 U. S. 37, 71 L. Ed. 916;

Duplex Printing Co. v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196;

Loew v. *Lawlor,* 208 U. S. 284; 52 L. Ed. 488, 13 Annotated Cases 815;

United States v. *Brims,* 272 U. S. 549, 71 L. Ed. 403;

International Organization v. *Red Jacket C. C. Co.,* 18 Fed. (2nd), 839.

Pittsburgh Terminal Coal Corporation v. *United Mine Workers of America, et al.,* 22 Fed. (2nd) 559;

American Steel Foundries v. *Tri-City C. T. Council,* 257 U. S. 184, 66 L. Ed. 189;

Vonnegut Machinery Co. v. *Toledo Machine and Tool Co.,* 263 Fed. 192, 200;

Truax v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;

Decorative Stone Co. v. *Building Trades Council,* 18 Fed. (2nd) 333, affd. 23 Fed. (2nd) 426.

In *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, this court, holding that a corporation's business is a property right and is entitled to protection against unlawful injury or interference, said that: if the purpose be unlawful, it may not be carried out even by lawful means, and although the purpose be lawful it may not be carried out by unlawful means; peaceful participation, even under the Clayton Act, is as much within the prohibition as one accompanied by force or threats and cannot be justified upon the ground that the participants may have some object beneficial to themselves or their associates, which possibly they might have been at liberty to pursue in the absence of the statute; the principal importance of Section Six of the Clayton Act is in what it does *not* authorize, and the limit it sets to the immunity conferred, it assuming the normal objects of a labor organization to be legitimate and that such an organization shall not be held in itself—because of its existence and operation—to be illegal, but that section does not relieve it from accountability for departure from its normal and legitimate objects, nor authorize it to engage in an actual combination or conspiracy or permit a labor organization to become a cloak for an illegal combination or conspiracy; the first paragraph of Section 20 of the Clayton Act merely puts into statutory form familiar restrictions already established and of general application, and it is but declaratory of the law as it stood before; the restrictive clauses of Section 20 must be strictly and literally construed; that section does not

repeal the prohibitions of the Sherman Act so far as applicable to labor organizations and does not confer upon such organizations a control over commerce that is denied to the governments of the States themselves; and this court further said:

> "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future; is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act. * * *."

In *Vonnegut Machinery Co.* v. *Toledo Machine and Tool Co.*, 263 Fed. 192, 200, the court said:

> "The interesting and unique question in the case however, is whether we have a situation here contemplated by and within the provisions of the first paragraph of Section 20 of the so-called Clayton Act. (Citation), and consequently one in which the court's injunctional powers are limited in view of any construction of the force of that measure. Concretely the query is whether at the foundation of this case is a controversy between employer and employees respecting terms and conditions of employment. If the Clayton Act is a discriminatory one, being in that respect class legislation, and assuming that it is yet constitutionally sustainable, an established and entirely valid rule of construction is applicable to the effect that the terms used should be strictly kept to their ordinary and usual

> force and meaning, while maintaining at the same time consideration of the evident purpose of the act. A law giving special immunities to a class necessarily impinges upon the rights of those against whom the statutory discriminations operate. The disturbance of parity of legal privileges between parties to a controversy manifestly affects the right, hence the rule of strict construction applies (Citation)."

In *American Steel Foundaries* v. *Tri-City Council,* 257 U. S. 184, 66 L. Ed. 189 this court declared that Section 20 of the Clayton Act "introduces no new principle into the equity jurisprudence of those (the Federal) courts. It is merely declaratory of what was the best practice always," and the court also said:

> "It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of Section 20, includes injury to the business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employees, between employers and employees or between employees, or between persons employed and persons seeking employment, and not such dispute between an employer and persons, who are neither ex-employees nor seeking employment. Duplex Printing Press Company *v.* Deering, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 195, 41 Sup. Ct. 172. * * *"

In *Truax* v. *Corrigan,* 257 U. S. 312, 323, 66 L. Ed. 254 this court said:

> "We have but recently considered the clauses of section 20 of the Clayton Act sometimes erroneously called the 'picketing' clause. American Steel Foundries *v.* Tri-City Central Trade Council, opinion announced December 5th (257 U. S. 184, ante A. L. R. 42 Sup. Ct. Rep. 72). They forbid an injunction in labor controversies prohibiting any person 'from attending at any place where any such person or persons may lawfully be for the purpose of peacefully obtaining or communicating informa-

tion, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading, others by peaceful and lawful means so to do.'

"We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity, or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it. We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put upon the same words by the Arizona supreme court makes these clauses of PP 1464 as far from those of section 20 of the Clayton Act in meaning as if they were in wholly different language."

In *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403, 6 Fed. (2d) 188, this court, in a case where the facts showed that a union workman would not work upon non-union made mill work, and this regardless of whether the same came from within or without the State of Illinois, where the agreement was made, and holding the defendants to be guilty of criminal conspiracy, in violation of the Sherman Act, said:

"They wished to eliminate the competition of Wisconsin and other non-union mills which were paving lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with

the understanding that the latter would refuse to install non-union made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The non-union mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out non-union millwork made within Illinois as well as that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."

In *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37; 71 L. Ed. 916 this court reversed a decree of the United States Circuit Court of Appeals for the 7th Circuit, affirming a decree of the United States District Court of the District of Indiana, dismissing a bill filed to enjoin a conspiracy in alleged violation of the Anti-Trust Acts. The plaintiffs in that action were engaged in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone. The Journeymen Stone Cutters Association was an association of mechanics engaged in the stone cutting trade. Plaintiffs sold some of their stone directly to buildings where it was fitted, trimmed, and set in place and the remainder was sold in the rough to contractors to be fabricated. The plaintiffs

were operating upon the open shop basis. The General Union issued a notice to all of its locals and members directing its members not to work on stone "that has been started, planed, turned, cut, or semi-finished by men working in opposition to our organization." Such stone was termed "unfair."

This court said p. 920:

> "From a consideration of all the evidence, it is apparent that the enforcement of the general order to strike against petitioners' product could have had no purpose other than that of coercing or inducing the local employers to refrain from purchasing such product. To accept the assertion made here to the contrary, would be to say that the order and the effort to enforce it were vain and idle things without any rational purpose whatsoever. And indeed, on the argument, in answer to a question from the bench, counsel for respondents very frankly said that unless petitioners' interstate trade in the so-called unfair stone were injuriously affected, the strikes would accomplish nothing."
>
> "That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial. Loewe *v.* Lawlor, 208 U. S. 274, 301, 52 L. Ed. 488, 502, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Boyle *v.* United States, 170 C. C. A. 603, 259 Fed. 803, 805, 806."

And further:

> "And the restraint of such commerce was the necessary consequence of the acts and conduct and the immediate end in view. Swift & Co. *v.* United States, 196 U. S. 375, 397, 49 L. Ed. 518, 524, 25 Sup. Ct. Rep. 276. Prevention of the use of petitioners' product, which, without more might have been a purely local matter, therefore, was only a part of the conspiracy, which must be construed as an entirety; and, when so regarded, the local transactions became a part of the general plan and purpose to destroy or narrow petitioners' interstate trade. W. W. Montague & Co. *v.* Lowry, 193 U. S.

38, 45, 46, 48, L. Ed. 608, 611, 612, 24 Sup. Ct. Rep. 307. In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint. And it is this result, not the means devised to secure it, which gives character to the conspiracy."

Neither the fact that there was no violence involved nor that one of the objects of the union was legitimate is an answer if the direct effect, as here, is to restrain interstate commerce.

United States v. *Reading Co.*, 226 U. S. 324, 57 L. Ed. 243;

Vandell v. *United States*, 6 Fed. (2d) 188;

Western Union Tel. Co. v. *Int. Brotherhood of Electrical Workers*, 2 Fed. (2d) 993, affirmed 6 Fed. (2d) 444;

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260;

United States v. *Railway Employees Department of American Federation of Labor, et al.*, 283 Fed. 479.

In this latter case the court quoted from *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349 and *United States* v. *Patten*, 226 U. S. 525, 57 L. Ed. 333 and other cases in this court, and generally reviewed the law.

The same case again came before the same court in 286 Fed. 228, on motion to dissolve the temporary injunction and dismiss the bill, which motions were denied, the questions involved were considered at length, and the contentions of the defendant overruled.

Reviewing and citing cases at length, the court further said:

"Defendant's construction of section 20 would confer immunity upon the specified acts when committed in a labor controversy, even though back of that controversy there was a conspiracy to over-

throw the government itself. * * * The principle that acts lawful in themselves take on an unlawful character when they are so interwoven with acts inherently criminal that the whole plan must be condemned is one of such frequent application that it is unnecessary to comment upon it, further than to mention its application to *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418."

IV.

The Decision of the District Court was based upon the Statute of New Jersey heretofore mentioned and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company Case, 96 N. J. E. 632; 126 Atl. 399, and the effect is that the District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the Fourteenth Amendment.

The New Jersey statute—"An act relative to persons combining and encouraging other persons to combine," P. L. 1883, p. 36, 3 Comp. Statutes of New Jersey, p. 3051, reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, or persons, or corporation."

In *Jonas Glass Co.* v. *Glass Bottle Blowers' Association* (1910), 77 N. J. E. 219, at p. 224, 79 Atl. 262, the New Jersey Court of Errors and Appeals, with respect to the scope of the act, P. L. 1883, p. 36, 3 C. S. of N. J. 3051, said (p. 224):

> "Reliance is placed by the defendants upon the 'Act relative to persons combining and encouraging other persons to combine.' P. L. 1883, p. 36; Gen. Stat. p. 2344, Pl. 23.

The enactment is (here follows the act):

> "In Mayer *v.* Journeymen Stonecutters' Asso., 47 N. J. E. (2 Dick.) 519, 531, Vice-Chancellor Green apparently treated this act as legalizing private injuries. And in Cumberland Glass Manufacturing Co. *v.* Glass Bottle Blowers' Asso., 59 N. J. E. (14 Dick.) 49, 53, Vice-Chancellor Reed construed it as permitting the adoption of peaceable measures for inducing workmen to quit or to refuse to enter an employment. *Whatever may have been the purpose of its framer, there are, as we think, constitutional obstacles in the way of giving the act so extensive a force.*
>
> The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are declared by our constitution to be unalienable. N. J. Const. art. 1, p. 1. No act of the legislature is to be construed as infringing upon these rights unless its language plainly and clearly requires such a construction. *If its language so reads, it is to the extent indicated unconstitutional and void. The act of 1883 is, as we think, properly to be treated as merely rendering the combination no longer indictable;* in effect, as repealing the rule laid down by the supreme court of this state in State *v.* Donaldson, 32 N. J. L. (3 Vr.) 151. *It does not legitimize an invasion of private rights nor prevent the party injured from having full redress.* Its proper scope is indicated in the opinion of Vice-Chancellor Pitney in Frank & Dugan *v.* Herold, 63 N. J. E. (18 Dick.) 443, 447, 448."

The same court in *Brennan* v. *United Hatters,* 73 N. J. L. 729, at p. 744, 65 Atl. 165, had quoted with approval the statements contained in *Frank & Dugan* v. *Herold,* 63 N. J. E. 443, 52 Atl. 152.

Brennan v. *United Hatters,* 73 N. J. L. 729, 65 Atl. 165, and *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.,* 77 N. J. E. 219, 79 Atl. 262 were cited, with approval, in *Frank* v. *Nat. Alliance of Bill Posters,* Supreme Court of the State of New Jersey, 89 N. J. L. 380, 99 Atl. 134 and,

again, in *Dubrow* v. *Hornstra*, 95 N. J. L. 288, at p. 290, 112 Atl. 336 and by the Court of Chancery of New Jersey in *Baldwin Lumber Co.* v. *Local No. 560, etc.*, 91 N. J. E. 240, 109 Atl. 147 and, again, in *Currier & Sons* v. *Inter. Molders' Union*, 93 N. J. E. at p. 66, 115 Atl. 66 and, again, by the Court of Errors and Appeals in *Keuffel & Esser* v. *Inter. Asso. of Machinists* (1921), 93 N. J. E. 429, 116 Atl. 9.

In *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 79 Atl. 262 the vote was ten to four. Minturn, *J.*, wrote a dissenting opinion, 77 N. J. E. 225, 79 Atl. 265.

In *Keuffel & Esser* v. *Inter. Asso. of Machinists*, 93 N. J. E. 429, 116 Atl. 9 the vote was 9 to 5. There were several dissenting opinions. That of Mr. Justice Minturn is found on p. 439 of 93 N. J. Eq. 429 at page 12 of 116 Atl. Reference to these dissenting opinions will indicate that the decisions of the New Jersey Court of Errors and Appeals in *Jonas Glass Co.* case, and *Keuffel & Esser* v. *Inter. Asso. of Machinists* were reached after a careful consideration of all that could be said in favor of the construction now apparently put upon the statute by the same court in *New Jersey Painting Co.* v. *Local No. 26, etc.*, 96 N. J. Eq. 632, 126 Atl. 399 and the court deliberately refused to put that construction upon the statute and held that, if such a construction *were* put upon the statute, it would be unconstitutional.

The decisions in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 224, 79 Atl. 262 and in *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165 were written by Mr. Justice Pitney, afterwards a Justice of this court. This court has cited, with approval, the case of *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881, which was referred to, relied upon and approved by the New Jersey Court of Errors and Appeals in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 224, 79 Atl.

262 in *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165 was cited with approval by this court in *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260. Both *Barr* v. *Essex Trades Council* and *Brennan* v. *United Hatters* were cited, with approval, in *International News Service* v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211, and in that case this court said:

> "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

Jonas Glass Co. v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 223, 41 L. R. A. N. S. 445, 79 Atl. 262 was cited with approval in *Hitchman Coal and Coke Co.* v. *Mitchell*, (1921) 245 U. S. 229, 62 L. Ed. 260, at p. 278; and, again, in *American Steel Foundries* v. *Tri-City C. T. Council*, (1921) 257 U. S. 184, 66 L. Ed. 189, at p. 198.

In the opinion in *New Jersey Painting Co.* v. *Local No. 26, etc., et als.*, 96 N. J. E. 632, 126 Atl. 399, the New Jersey Court of Errors and Appeals, in disapproving what that court had previously said, in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262, as to the effect of the statute, said at p. 640: (96 N. J. E.)—"Employers have no vested interest in the labor of workers."

This may be true, but employers *have a vested interest in the free flow of labor*, and in the right to make contracts for the employment of labor, and these rights may not be interfered with, except for causes which the law deems adequate, and in no case has the right to the free flow of labor and the right to be free from unlawful interference with the relationship of employer and em-

ployee been more strongly asserted than in *State* v. *Donaldson*, 32 N. J. L. 151 (1867), where the Supreme Court of New Jersey, said:

> "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be prescribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say, that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion; the men agree to leave simultaneously, in large numbers and by pre-concerted action. We cannot close our eyes to the fact, that the threat of workmen to quit the manufacturer, under these circumstances is equivalent to a threat, that unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion; if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous

losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law, which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another."

In *Jersey City Printing Company* v. *Cassidy*, 63 N. J. E. 759 (1902) 53 Atl. 230 Vice-Chancellor Stevenson said:

"The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case, in the house of lords, was referred to, in the language of Lord Ellenborough, as a 'probable expectancy.' This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employee, of absolute freedom to employ or to be employed. The peculiar element of this perhaps newly-recognized right is that it is an interest which one man has in the freedom of another."

* * * * * * * * *

"A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'"

"In undertaking to ascertain and define the rights and remedies of employers and employees, in respect of their 'probable expectancies' in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar 'probable expectancies.' It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules."

"It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employee, manifestly is freedom on both sides of the market. The merchant with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy; the purchaser, a householder, seeking supplies for his family, with money in his pocket and free to buy might find his liberty of no value and might suffer from lack of food and clothing if the shopmen who deal in these articles were so terrorized by a powerful combination as to be coerced into refusing to sell either food or clothing to him. * * *"

"A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreason-

able molestation and annoyance from the words, actions or other conduct of any other persons *acting in combination.*" (Italics the court's.)

And in *Barr* v. *Essex Trades Council*, 53 N. J. E. 101 (1894), 30 Atl. 881 Vice-Chancellor Green said at page 112:

> "A man's business is property. By the first section of the bill of rights of the constitution of New Jersey, the right of acquiring, possessing and protecting property is classed, as a natural and inalienable right which all men have, with those of enjoying and defending life and liberty, and of pursuing and obtaining safety and happiness. This is an echo of Magna Charta repeated in the Declaration of Independence. Mr. Justice Bradley, in the Slaughter House Cases, 16 Wall. 36 (at p 116) says: 'For the preservation, exercise and enjoyment of these rights (life, liberty and the pursuit of happiness) the individual citizen, as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect, *and a calling, when chosen, is a man's property and right.* (Italics the court's.) Liberty and property are not protected where these rights are arbitrarily assailed."

In *Brennan* v. *United Hatters*, 73 N. J. L. 729 (65 Atl. 165) the New Jersey Court of Errors and Appeals at p. 744, said:

> "Our Court of Chancery in Barr *v.* Essex Trades Council, 8 Dick. Ch. Rep. 101, 115; Frank & Dugan *v.* Herold, 18 Dick. 443, and Jersey City Printing Co. *v.* Cassidy, *Id.* 759, has affirmed the right of the citizen to conduct his business free from malicious interference, including his right to have free opportunity to hire employees. And we may remark that the right of one seeking employment to have free opportunity to gain employment, and to retain a position of employment once it is gained, is as precious in the eye of the law as the right of the employer."

And substantially the statement was repeated in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, p. 223, 41 L. R. A. (N. S.) 445, 79 Atl. 262.

That right was expressly recognized by this court in *Truax* v. *Raich*, 239 U. S. 33, 38, 60 L. Ed. 131, 134 and *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L Ed. 260, at p. 276.

It is a mistake to say that this right to the free flow of labor is any new right. It was recognized at common law. It was the basis of the rule at common law that it was an indictable conspiracy to entice away a servant which was the justification for the decision of the Supreme Court of New Jersey in *State* v. *Donaldson*, 32 N. J. L. 151 to the effect that it was an indictable conspiracy for several employees to unite to compel a person to quit his employment. It is a *necessary* right in the conduct of a business. It is as necessary as the right to be free to sell an article of commerce. What can it profit a man if he has the right to build a manufacturing establishment without unreasonable interference and to sell the product which he shall manufacture without such interference if he have not the right to obtain employees to manufacture the article without unreasonable interference?

That right is property. Being property, it is protected from being interfered with by the Legislature, both under the Constitution of the State and the Fourteenth Amendment of the Federal Constitution. It is not, I repeat, "a vested interest in the labor of workers." It is a vested interest in the right to make contracts, and to employ workers without unreasonable interference.

In *Allgeyer* v. *State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832, this court said:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by in-

> carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

And to the same effect is *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937.

I now come to a decision of this court which I urge clearly indicates that, if the statute is to be construed as the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 126 Atl. 399, 96 N. J. E. 632, and as the court below, construed it, the act is unconstitutional, *i. e.*,

Traux v. **Corrigan, 257 U. S. 320, 66 L. Ed. 254.**

In that case there came before this court the refusal of the Supreme Court of the State of Arizona to grant an employer an injunction against a conspiracy and boycott, one of the concomitants of the conspiracy and boycott being picketing. The Supreme Court of Arizona rested its decision upon a statute of Arizona which, as construed by that court, prevented it from prohibiting picketing so long as peaceful, and, as the late Chief Justice of this court said in delivering the opinion of this court:

> "The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by 'picketing' in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights."

This court held that the statute was unconstitutional both as a taking of property without due process of law and a denial of the equal protection of the law. It said:

> "The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. * * *"
>
> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence."

It was sought to sustain the statute under *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 61 L. Ed. 667, upon the ground that the State had control over the relations of employees and employers and that they were a class by themselves. This court said, 66 L. Ed. 261:

> "These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the State to vary the rules of the common law as to the fellow-servant doctrine, assumption of risk, and negligence in that relation. They hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute, is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a

State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

This court held that, if the statute should be construed as merely to withhold from the parties a remedy through equitable relief by injunction, it was void as denying the equal protection of the law.

The court said that the classification of employers in the manner created by the statute was illusory, and,

"Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. *The Constitution was intended —its very purpose was—to prevent experimentation with the fundamental rights of the individual.* We said through Mr. Justice Brewer, in Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551, 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' "

* * * * * * *

"It seems a far cry from classification on the basis of relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee, on the business and property right of the employer. It is really a little difficult to say, if such classification can be sus-

> tained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?"

The dissenting opinion of Mr. Justice Holmes, in which he says:

> "By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."

indicates to what extent the prevailing opinion went.

Mr. Justice Pitney in the Truax case thought that the State of Arizona might properly refuse to permit employers to obtain *equitable* relief by injunction, the Justice stating:

> "And just as one state might establish such protection by statute, so another State may, by statute, dis-establish the protection, even as States have differed in their judicial determination of the general law upon the subject."

The majority of the court, however, did not accede to that view.

If the statute has the construction placed upon it by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632, 126 Atl. 399, then——the judicial department of the State of New Jersey, by its construction of the law and the statute, (and the District Court by following that construction)

has permitted the taking of the property of an employer without any process whatever and has permitted a discrimination based upon the fact of residence alone, a discrimination between citizens of one State and those of another. The effect is much more widespread and ruinous to employers of labor than was the effect of the action of the Supreme Court of Arizona in denying relief in a case of peaceful picketing. It is therefore, by the action of the State, through its legislature in adopting the statute and its judicial department in constructing it, that the constitutional rights of Barker are invaded.

The statute of New Jersey, P. L. 1883, as construed by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632, 126 Atl. 399 is unconstitutional and the court below erred in giving any force or effect to it.

CONCLUSION.

In conclusion I submit to your Honors that if unions are permitted to use the weapon of the strike to enforce a discrimination such as is here involved, merely because that discrimination has to do with the matter of wages, however arbitrary the classification may be, then it will not be difficult to devise means whereby, under the law, the business fabric of the country can be torn apart and the present social system completely destroyed; that if discrimination of this kind is permitted by combinations of labor unions, employers must be accorded the same right as against labor unions, for, as this court said in *Coppage* v. *Kansas,* 236 U. S. 1, 59 L. Ed. at p. 448:

> "And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers?"

Employers, therefore, must be permitted to combine to discriminate against employees upon any conceivable ground, however arbitrary.

Instead of a government of law, in which each man is free, enjoying equal rights with his fellows, we will have a government of labor unions and combinations of employers.

For the reasons aforesaid it is submitted that the decrees of the court below should be reversed and the record remitted to the District Court with instructions to enter a decree granting the plaintiff the relief prayed in its bill.

Respectfully submitted,

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Plaintiff below and Petitioner here.